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THE  
STORY OF NUNCOMAR  
AND THE IMPEACHMENT OF  
SIR ELIJAH IMPEY

BY  
SIR JAMES FITZJAMES STEPHEN, K.C.S.I.

*One of the Judges of the High Court of Justice  
Queen's Bench Division*

IN TWO VOLUMES

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THE  
STORY OF NUNCOMAR  
AND THE IMPEACHMENT OF  
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## CHAPTER IX.

### THE IMPEACHMENT OF IMPEY.

IN the preceding chapters I have related in the fullest detail every incident which I have been able to discover connected with Nuncomar's charges against Hastings, the charge of forgery made against Nuncomar, his trial and execution, and the view taken of those transactions at the time when they happened. I now come to consider the charges made against Impey on account of his connection with these events, and to express my own opinion upon them. Before entering upon this discussion it will be necessary to describe the manner in which the charges came to be made.

The questions relating to Nuncomar were a part only of a far wider and more intricate quarrel between the Governor-General and Council on the one side, and the Supreme Court on the other. I have given a full account of it in the following chapters; but I have thought it more convenient to finish the story of Nuncomar before going into it. It is a very intricate story, and its details do not possess the picturesque interest which attaches to Nuncomar's case. In one part of it, no doubt, corruption

has been imputed both to Hastings and to Impey; but for the most part the interest of the matters in dispute is derived rather from questions of general policy, and from the light which they throw on the difficulties under which the Indian Empire was established, than from the intrinsic character of the details. In order, however, to understand how Impey came to be impeached, it is necessary to state in the most general way the nature of the dispute between the Council and the Court, and a few of its principal incidents.

The principal parties in Bengal between 1774 and 1784 were the Council, the Supreme Court, and the European residents, whether servants of the Company or not; and the Council itself was divided into two parties, of which Hastings and Francis were the heads. Two contradictory theories were held as to the way in which the country should be governed, and neither of them was fully adopted by any of the parties mentioned. One theory was, that the King of England was and ought to be regarded as the sovereign, the East India Company being simply a joint-stock company intrusted with certain special powers by English statutes and charters. The other was that the East India Company were the virtual sovereigns of the country by reason of the grant of the Diwani by Shah Alam, and treaties with the Subadars of Bengal, and that English statutes and English courts of law were to be regarded merely as accessories to this power, not to say as usurpations upon it. As Shah Alam was a fugitive, and Mobarruck ul Dowla little better than a state prisoner, this meant in practice that the Europeans in India, and in particular the Company's servants, were to do as they pleased. Of course, such a theory could not be avowed or acted upon. It was monstrous in itself,



and expressly condemned by Acts of Parliament, which could not be resisted, but it had great influence, as appears from all the papers and debates of the time. <sup>1</sup> The form which it took was that of zeal for the native powers, and indignation at everything which interfered with native laws or institutions. The view that the King of England was the sovereign of Bengal, which was obviously true in fact, assumed different shapes. <sup>2</sup> It seems that in his heart Francis held this view even more decidedly than the Judges of the Supreme Court, but he drew from it very different inferences. Francis's inference was that the true policy was to declare the King's sovereignty boldly, to extend the jurisdiction of the King's Courts over the whole of Bengal, and to subordinate the native courts to the Supreme Court. In practice his inference was different. It was that the Council collectively were in the position of a Viceroy, and that the Supreme Court ought to regard them in the light of a supreme executive authority, with power to define the limits of that authority. The Supreme Court considered that they, and not the Council, represented the sovereign, and that, except in cases where Parliament had given express power to the Governor-General and Council, they were only the managing directors of a joint stock company. My impression is that both Hastings and Impey did their best in good faith in their own

<sup>1</sup> See, as a single strong illustration, Colonel Fullarton's speech on the impeachment of Impey.

<sup>2</sup> See a letter from Francis to Lord North dated Feb. 1775 (Merivale ii. 27.) He says in it *inter alia*, "The first thing to be done is to "declare the King's sovereignty over the provinces." . . . "The "jurisdiction of the Supreme Court should be made to extend over all "inhabitants. I conceive that this may be done without touching the "country Courts." At this time Francis had been little more than three months in India.

spheres to conduct public business, both executive and judicial, as well as they could without much troubling themselves with any theory on the subject. Hastings's task was infinitely the more arduous, important, and responsible of the two, and he was in all ways a far more remarkable man than Impey; but Impey also had to struggle with great difficulties, and take considerable responsibilities, and I think his side of the question has never been adequately put forward. As to Francis and his colleagues my opinion is far less favourable. Their conduct appears to me to have been rash and foolish to the last degree, and to have been influenced on all occasions by that dangerous counterfeit of public virtue which consists in thinking that your enemies are desperately wicked and deceitful above all things, and that your own party objects are so obviously right and wise that whoever opposes them must act from the vilest of motives in the pursuit of the worst of objects.

Without at present pushing this matter further, I proceed to enumerate very shortly the principal events which happened in the interval between Nuncomar's execution in 1775 and Impey's impeachment on the charge of a judicial murder in 1788.

The quarrels between the Council and the Court began before Nuncomar's arrest for forgery, and quite independently of it. The majority of the Council recorded <sup>1</sup>a minute as early as 11th April, 1775, in which they protest against the jurisdiction assumed by the Court, and through that and the following year they recorded repeated complaints on the subject. The questions between the Council and the Court came to a head in a famous case known as the Patna Cause, which lasted from 1777-1779,

<sup>1</sup> Touchet, Gen. App. No. 3, encl. 1.

and in another of even greater importance called the Cossijurah Cause which was tried in 1779-1780. The Patna Cause was supposed, not I think correctly, to have determined in substance that the provincial councils, which at that time acted as Courts of Justice, had no legal authority or indeed existence. The Cossijurah Cause seems to have been considered to involve the consequence that the Court claimed to extend its jurisdiction over all the landholders of Bengal. In this case the Council opposed the execution of the process of the Court by military force, and substantially confined its jurisdiction by the same means within the town of Calcutta. It was out of this transaction that the charge brought against Hastings and Impey, of giving and receiving a bribe, was said to arise. It was said that Impey was made Judge of the Sudder Diwani Adalat, or Civil Court of Appeal for the district Civil Courts, with a large salary, substantially in consideration of his giving up the claims of the Supreme Court to jurisdiction over the zemindars.

About the same time the Europeans in Calcutta made grievous complaints of the Supreme Court. Under the Charter it tried civil cases without a jury. Against this they petitioned, and also set forth other acts of the Court which they regarded as objectionable. The petition resulting from this agitation was known as <sup>1</sup>Touchet's petition, from the name of one of the agents for the petitioners, and their report and its appendices are the principal authorities on the quarrel between the Court and the Council. The report was published in 1781.

About the same time was appointed the Committee on the Administration of Justice in India, of which Burke was

<sup>1</sup> It is remarkable that he was one of the jury who tried Nuncomar.

the leading member, Francis (who returned from India 19th October, 1781) being supposed to act as <sup>1</sup> his inspirer. The first report of this Committee (5th February, 1782) reported against Impey's acceptance of the office of Judge of the Sudder Diwani Adalat. <sup>2</sup>The House of Commons, on the motion of General Smith, passed a resolution on the 3rd May, 1782, addressing the Crown for the recall of Impey "to answer the charge of having accepted an "office granted by, and tenable at, the pleasure of the "servants of the East India Company, which has a "tendency to create a dependence in the said Supreme "Court upon those over whose actions the said Court "was intended as a controul."

<sup>3</sup>This resolution was transmitted to Impey by Lord Shelburne on the 8th July, 1782. He received it 27th January, 1783, and left India on the 3rd December in the same year, and arrived in London in June, 1784. He was neither dismissed from his place, nor called upon to answer the charge on which he had been recalled—nor indeed does any particular notice appear to have been taken of him till his name came to be mentioned in the debates on the impeachment of Hastings in 1787. He continued to hold the office of Chief Justice till November, 1787, <sup>4</sup>wheref his resignation was accepted. On the <sup>5</sup>12th December, 1787, Sir Gilbert Elliot, afterwards Lord Minto, moved that his complaint against Impey should be received and laid on the table. This motion was agreed to. Articles of charge were accordingly pre-

<sup>1</sup> "During those early years after Francis's return he evidently took "an active part in advising and informing those English politicians who "were busily engaged in conducting the movement against Hastings and "the Company" (Merivale, ii. 219).

<sup>2</sup> *Parl. Hist.* xxii. 1411.

<sup>4</sup> *Impey's Life*, p. 285.

<sup>3</sup> *Life of Impey*, p. 270.

<sup>5</sup> *Parl. Hist.* xxvi. 1335.

pared and printed for the use of members. They were six in number, and related to the following subjects :

1. Nuncomar's case. 2. The Patna Cause. 3. The extension of the jurisdiction of the High Court. 4. The Cossijurah case. 5. The appointment to be Judge of the Sudder Diwani Adalat. 6. The taking of affidavits by Impey in connection with Hastings's proceedings at Benares.

The charge relating to Nuncomar was regarded as so much the most important of them all that Impey begged to be heard upon that first. His petition was granted, and he was heard upon it at the Bar of the House on the 4th February, 1788. Evidence was taken upon this charge before a Committee on various days in the course of the same month. The question whether Impey should be impeached upon it was debated at full length on the <sup>1</sup> 18th April and the 7th and 9th May, when the motion was rejected by seventy-three to fifty-five.

<sup>2</sup> A faint effort was made to proceed with the charge upon the Patna Cause, but it was unsuccessful ; the rest of the impeachment was never proceeded with. Substantially, therefore, the question of impeaching Impey was confined to the charge relating to Nuncomar.

The order in which the matter was brought before the House was most inconvenient. The articles were first laid on the table ; Impey's defence followed ; the evidence was then taken, and last of all came the <sup>3</sup> accusation. The best way to give the effect of the

<sup>1</sup> *Parl. Hist.* xxvii. 292, 416, and 427.

<sup>2</sup> *Ibid.* xxvii. 599-603 (27th May, 1788).

<sup>3</sup> I have in earlier parts of this work given references to the speech of Sir Gilbert Elliot as reported in the Parliamentary History, and have said that the earlier part of it only was corrected by Sir Gilbert himself. Just before the present sheet was finally corrected for the press, I received from

discussion will be, first to examine the charge itself, and then to consider the different matters charged, in the light of the statement already made in the earlier chapters of this work, applying the various arguments used by Impey and his accusers to those facts. I have added my own opinion, formed upon a review of all the facts and arguments.

In his famous speech at Bristol, Burke declared himself to be incompetent to the task of preparing an indictment against a whole people. He was certainly incompetent to draw an indictment against an individual, for it is impossible to imagine anything worse of their kind than the articles which he preferred against Hastings, and the articles preferred against Impey, which are in the same style, and presumably by the same author. The requisites of an accusation are obvious enough, and are those which are found in a modern indictment, and which, though overgrown with many technicalities, were found in the old-fashioned indictments also. An accusation ought to state directly, unequivocally, and without going into either argument or evidence, that at such a time and place the person accused has done such and such things, thereby committing an offence against such and such a law. The articles of impeachment against both Hastings and Impey violated every one of these obvious rules. Instead

Sir Gilbert's great-grandson, the Hon. A. Elliot, M.P., a copy in 448 4to pages of his ancestor's speech, which I have examined and refer to as the "printed speech." It stops in the most tantalizing way in the middle of a sentence and omits all the later part of the speech. It presents, however, his legal argument exactly as he delivered it, and explains some matters which I did not understand when this chapter was written, and which I have accordingly referred to in notes. It appears from this speech that Elliot himself drew the articles of charge. They are, however, in close correspondence with Burke's articles against Hastings, and are obviously modelled upon them.

of being short, full, pointed, and precise, they are bulky pamphlets sprinkled over with imitations of legal phraseology. They are full of invective, oratorical matter, needless recitals, arguments, statements of evidence—everything in fact which can possibly serve to make an accusation difficult to understand and to meet. They are, moreover, extremely tricky, being full of insinuations, and covering, by their profusion of irrelevant matter, the total and no doubt designed absence of averments essential to the conclusion which they are meant to support. In short, they are as shuffling and disingenuous in substance, as they are clumsy, awkward, and intricate in form. These defects are all conspicuous in the article which charges Impey with the judicial murder of Nuncomar.

<sup>1</sup> The following is an abstract of its contents, following as closely as possible in all material particulars its very words. I omit the “whereases” and other imitations of legal phraseology with which it is sprinkled to give it a legal appearance, but I have, as far as possible, taken the actual expressions of the charge, though I have greatly condensed it. Its substance is as follows:—

The Supreme Court of Calcutta was established in 1774 on such terms as to make it independent of the East India Company, and the main object of its establishment was to protect the natives against the oppression of the Company's servants, and particularly to protect them in making accusations and complaints. Impey was well acquainted with this.

Impey was appointed Chief Justice of the Supreme Court in 1774.

<sup>1</sup> There is a copy of it in the Wellesley collection of papers at the India Office Library.

Soon after Impey's arrival at Calcutta, Nuncomar, before the Council, accused Hastings of corrupt practices. His accusations were written, minute and specific. Hastings did not deny them, but evaded inquiry by dissolving the Council, thereby giving strong confirmation of the truth of the charges.

The Council determined to proceed in the investigation of this charge, and Hastings, in order to defeat it, prosecuted Nuncomar for a conspiracy. Whilst this prosecution was pending "a direct attack was made on "the life of the said accuser of the Governor-General "by indicting Nuncomar capitally for forgery." No steps had been taken towards the criminal prosecution of such alleged forgery till Nuncomar accused Hastings. "The "circumstances aforesaid could leave no doubt in the "mind and opinion of any person <sup>1</sup>acquainted therewith, "that the said prosecution was set on foot with a view of "defeating the said accusation, and the same was <sup>2</sup>con- "sidered as a political measure contrived, either by the "said Warren Hastings, or by his party and adherents, to "extricate the said Warren Hastings from his desperate "condition," and to deter other natives from accusing him.

Nuncomar was peculiarly entitled to the protection of the Court, because it was one principal object of its institution to protect all persons in the detection of corrupt practices; but Impey "became in effect the "abettor and instrument of Hastings, or of his partisans, "in the said wicked and unprincipled attack on the life "of his said accuser, and the said Sir Elijah Impey "converted His Majesty's commission and authority, the "laws of England, and the sacred character of magistracy,

<sup>1</sup> It is not said that Impey was acquainted therewith.

<sup>2</sup> It is not said by whom.



“into a new means of impunity, and a new and additional engine of revenge, oppression and terror, in the hands of those whom he was commissioned to controul.

“In pursuance of the said corrupt and abominable design he, the said Sir Elijah Impey, did entertain the said prosecution, and did permit the said indictment to be tried by a jury of British subjects, and did pass sentence of death on Nuncomar, and refused to grant leave to appeal and to grant a respite.

These proceedings were illegal (1) because they were not authorised by the Regulating Act, and though to some extent they might be authorised by the Charter, the Charter was to that extent void, as Impey ought to have known, and he was moreover criminal in procuring the insertion of those clauses in the Charter.

(2.) <sup>1</sup> Because Nuncomar was tried as having been an inhabitant of Calcutta at the time of the forgery, whereas in truth, he was at that time confined as a prisoner at Calcutta.

(3.) Because the Act under which Nuncomar was tried, (2 Geo. II. c. 25), did not extend to India.

These proceedings were also contrary to natural justice:

(1.) Because forgery was not “a capital crime by the laws” of India.

(2.) Because the prosecution was based on the Charter of the Supreme Court, which did not reach Calcutta till 1774, whereas the alleged forgery was said to have been committed in 1770. So that Nuncomar was tried by an

<sup>1</sup> This assertion was altogether unfounded, and is in contradiction to the draft plea to the jurisdiction prepared by Mr. Farrer. In the printed speech, Sir Gilbert Elliot states the grounds on which the assertion was made, but admits that they were not before the Court at the trial, and practically gives up the point.

*ex post facto* law, "which is contrary to the universally-received and acknowledged principles and practice of all rational societies and civilised nations, and is a tyranny not to be justified under any Act of a British Parliament, or any Charter of a British King, and is utterly repugnant to the spirit of English law," &c., &c.

Impey, so far from acting as counsel for the prisoner, acted as counsel for the prosecutor, "and pronounced a charge when he summed up the evidence given on the said trial with the most gross and scandalous partiality, dwelling on all the points which were favourable to the prosecution, and either omitting altogether, or passing lightly over, such as were favourable to the prisoner, and manifesting throughout the whole proceeding an ardent wish and determined purpose to effect the ruin and death" of Nuncomar.

All these matters "evinced and demonstrate a corrupt interest of the said Sir Elijah Impey, in the destruction of the said Maharajah for purposes detestable in themselves, but much more detestable in the said Sir E. Impey's peculiar station, and gave just grounds to the native inhabitants of the said provinces and to the rest of the world, for believing that the said proceedings were the fruit of a corrupt and wicked conspiracy between the said Sir Elijah Impey and the said Warren Hastings or his abettors, for the purpose of saving the said Warren Hastings from a just accusation by accomplishing the death of his accuser."

This charge covers more than six large folio pages, each containing sixty-four lines of small print. It is everything which such a document ought not to be. Instead of a direct definite allegation of guilt in simple language, it is an unwieldy argument, full of rhetoric

and passion to prove the guilt which it ought to allege, but long as it is, it is full of defects, which are not merely technical, but substantial and significant in the highest degree.

It states as the foundation of the whole charge against Impey, the conduct of Hastings when he was charged by Nuncomar with corruption ; conduct which, it says, would leave no doubt in the mind of any person acquainted therewith, that the prosecution was set on foot in order to defeat the accusation ; but it does not say that Impey was acquainted therewith, although a little before it states in most elaborate language that Impey "was well acquainted" with the objects of the Regulating Act. The reason why Impey's knowledge of Hastings's conduct is not alleged, no doubt was because it could not be proved, and probably did not exist, but it is an essential step in the argument which the charge advances to prove Impey's guilt. <sup>1</sup> Impey said of this matter in his defence that these circumstances were not only not in evidence on the trial, but were not, in fact, known to himself, or to the other judges. "By rumour, and by rumour only, was it known that Nuncomar had preferred some accusation against Mr. Hastings for corruption in his office ; the accusations which are said to have been publicly <sup>2</sup> brought, were preferred to the Council in their secret department, where each member was under an oath of secrecy. If the prisoner was an object of the special protection of the Court, from the circumstances in which he stood as an accuser, that claim would have been laid before the Court in evidence and formed part

<sup>1</sup> *Parl. Hist.* xxvi. 1380, 1381.

<sup>2</sup> "Was *publicly* accused," are the terms of the charge. As to the oath of secrecy, see same remarks in the next chapter.

“of the defence ; the particulars of the accusations, the “opinion of the majority of the Council of their truth, “the proceedings on them, the conduct of Hastings, the “grounds on which the majority thought the accusations “could be maintained, were all matters capable of easy “proof,” and might and would have been proved if their nature was such as to leave no doubt in the mind of any person acquainted therewith, that the prosecution was set on foot for the protection of Hastings, yet no proof was given of any one of these things. To this argument, Sir Gilbert Elliot, so far as I can see, made no reference whatever in his motion to impeach Impey. The absence of any averment of knowledge in the charge is to my mind conclusive proof that Elliot knew that Impey’s argument on it was unanswerable.

Another remarkable point in the charge is the way in which it alleges a conspiracy between Hastings and Impey. It makes no direct explicit charge at all. It merely states a number of facts, and then says that they give just grounds for believing that there was a conspiracy between Impey and Hastings, or his abettors. An indictment for conspiracy so drawn would be bad on the face of it, and would be held to contain no charge at all, and indeed it does not, for it alleges not guilt, but grounds for a suspicion of guilt. It does not even suggest definitely a conspiracy with Hastings, but only in the alternative, a conspiracy either with Hastings, or with some unknown “abettors.”

The well-known and wholesome rule of special pleading against what is called <sup>1</sup>“pleading evidence,” is set at naught in the charge, but from first to last it states no

<sup>1</sup> You must say positively, *e.g.*, “A committed murder,” and not “several respectable witnesses say that they saw A commit murder.”

fact which taken by itself tends to prove any conspiracy between Hastings and Impey, or to show any motive on Impey's part to enter into such a conspiracy, Stated in the most naked way it may be reduced to this form. You, Impey, ought to have inferred from facts, which we do not say you knew, that the charge against Nuncomar was trumped up to protect Hastings, and there-upon you ought to have quashed the indictment, but you did not do so. On the contrary, you tried the indictment though it was illegal, you showed partiality in and after the trial, and this proves that you must have had a bad motive for what you did, and the whole of your conduct suggests a conspiracy with Hastings.

When we come to consider the substance of this ill-conceived and cumbrous document it appears that the substantial charges against Impey were four in number, namely :—

First, that he acted illegally in trying Nuncomar at all.

Secondly, that he misconducted himself at the trial.

Thirdly, that he conspired with Hastings to cause Nuncomar to be prosecuted on a capital charge.

Fourthly, that from a corrupt wish to screen Hastings he refused to give Nuncomar leave to appeal, and refused to respite Nuncomar.

Upon these charges it is to be observed that the second, third, and fourth are quite independent of the first.

Whether the trial of Nuncomar was or was not legal it was Impey's unquestionable duty to conduct it fairly, and if he really did conspire with Hastings to procure the conviction of Nuncomar, or corruptly refused to respite Nuncomar, having the power to do so and being convinced that he ought to exercise that power, he no doubt

committed one of those offences for the punishment of which impeachment is not only the proper but the only possible mode of proceeding.

I shall consider each of these charges in the order in which I have mentioned them.

First then, Was the trial of Nuncomar illegal?

Of the different ways in which the charge of illegality is shaped one appears to me so extravagant that its appearance in so solemn an instrument as articles of charge intended as the basis of an impeachment, throws discredit enough on the judgment and legal knowledge of those who prepared it to show that they were unfit for the task they had undertaken. I refer to the part of the charge which half alleges and half insinuates that, in "entertaining the prosecution and in permitting the said "capital prosecution to be tried," Impey committed an offence, as he ought to have quashed the indictment because "it was considered " by some unknown and unmentioned persons " as a political measure," and because circumstances existed which " could leave no doubt in the " mind and opinion of any person acquainted therewith," (which Impey was not alleged to be) "that the said "prosecution was set on foot with the view of defeating "the said accusation." Of this it is enough to say that it assumes, first—that judges ought to take judicial notice of rumours imputing malicious motives to prosecutors; secondly, that the fact (proved by such rumours) that a prosecutor is actuated by a malicious motive establishes the innocence of the person accused; and thirdly, that if the judge is convinced of the innocence of the accused by a rumour that the prosecutor is malicious, it becomes the judge's duty to "quash the indictment," by which I suppose the author of the charge meant to prevent the

case from being tried, for the quashing of one indictment does not interfere with the presentment of another for the same offence.

Another part of the charge of illegality appears to me equally monstrous. It is asserted or insinuated in several of the expressions quoted, that even if the law of England justified Impey's course, it was so distinctly opposed to natural justice that he was a criminal for putting it in force. To admit such a principle would be to destroy the specific character of law, and to throw everything into confusion. To punish a judge for enforcing a bad law implies a right and duty on the part of the judge to decide whether the law is good or not; and this puts the judge above the legislature. It seems to me unnecessary to say more on this topic than that Impey must be taken to have acted legally if he acted according to the Regulating Act and the Charter issued under it.

The really serious part of the charge of illegality may be shortly summed up by saying that Nuncomar was not subject to the law of England at all in 1770, when his offence was said to have been committed, and that if he was subject to it, the particular Statute under which he was tried (25 Geo. II. c. 2), was not in force at Calcutta at the time when the offence was committed, or at the time when the trial took place.

It was further alleged in the article of charge that the law of England, so far as it was introduced into Calcutta at all, was introduced when the Supreme Court was proclaimed in 1774, but this was not really a separate point. If the law of England was not introduced into Calcutta before 1770 when the offence was alleged to be committed, the whole proceeding was clearly erroneous, and it is

immaterial to the question whether the law of England was or was not introduced afterwards.

This then is the great question as to the legality of the proceedings against Nuncomar. Was the criminal law of England in force in Calcutta in 1770 when the deed purporting to be that of Bollakey Doss was uttered? If so, was the Statute, 25 Geo. II. c. 2, in force as part of it.

<sup>1</sup> Impey's case upon this, as stated in his defence at the Bar of the House, was as follows:—The criminal law of England, though not in force in Bengal generally, was introduced into Calcutta first, in 1726, by a Charter granted by George I. to the Mayor's Court, and afterwards in 1753 by a second Charter granted on the surrender of the first, and to much the same effect. These Charters constituted the governor and certain members of the Council, justices of the peace, and commissioners of Oyer and Terminer, and gaol delivery, and required them to hold Courts of Quarter Sessions, at which they were to try all crimes except high treason. The Regulating Act provided that the Supreme Court should be "a Court of Oyer and Terminer, and gaol delivery in and for the said town of Calcutta and factory of Fort William in Bengal aforesaid, the limits thereof and the factories subordinate thereto," words which clearly give a local territorial jurisdiction over all persons in the places mentioned, to whatever race or nation they might belong. The Charter of the Supreme Court added something to the words of the Regulating Act, but nothing which they were not wide enough to include. The clause of the Charter is long, but in substance it provides that the Supreme Court is to be a Court of Oyer and Terminer,

<sup>1</sup> *Parl. Hist.* xxvi. 1359-1366,



and gaol delivery in and for Calcutta, and to have the same power as Commissioners of Oyer and Terminer in England, to inquire of "treasons, murders, and other felonies, forgeries," &c. Provision is made for summoning grand and petty juries and witnesses, and the Court is directed "to hear, examine, try, and determine the said indictments and offences, and to give judgment thereupon, and award execution thereof, and in all respects to administer criminal justice in such and the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of," as Courts of Oyer and Terminer in England.

Impey's view appears to have been—I do not quote his words—that the effect of all this was to introduce and reintroduce the Criminal Law of England into Calcutta three times, so that, as regarded offences committed between 1726 and 1753, the law of England, as it stood in 1726; as regarded offences committed between 1753 and 1774, the law of England, as it stood in 1753; and as regarded offences committed from 1774 onwards, the law of England, as it stood in 1774 would apply; but in each case, "as nearly as the condition and circumstances of the place and the persons will admit."

The offence imputed to Nuncomar would thus fall under the law of England as it stood in 1753. Now the Act under which he was tried (25 Geo. II. c. 2) was passed in 1729. It was at first passed for five years only, but was afterwards made perpetual. It was thus in force at the time of Nuncomar's alleged offence which took place, if at all, in 1770.

Impey disavowed in the strongest terms the imputation which many persons appear to have thrown on the Supreme Court, of having introduced the criminal law of England

indiscriminately into Bengal, Behar, and Orissa. He said in the strongest way, and no doubt with truth, that till he left Bengal in December, 1783, no indictment had been tried in the Supreme Court against any one but an inhabitant of Calcutta for an offence committed in Calcutta. He also stated that not only had the criminal law of England been understood to be introduced in 1753 but the East India Company had instructed their servants in Calcutta to act upon it, and had given them instructions as to the manner in which they should do so. He says, <sup>1</sup>“Among the records I found the instructions sent out by the Court of Directors with that Charter” (the Charter of 1753) “and expecting, as I really procured great information from them, ordered them to be copied. These instructions direct the new Court how to proceed against prisoners not understanding English, tells what crimes are misdemeanours, what simple felonies, what within clergy, what capital, and all the distinctions on that head; what punishments are to be inflicted, amongst which transportation is particularised; how to proceed in each case; and gives precedents of indictments for each crime, the oath for an interpreter where the prisoner

<sup>1</sup> *Parl. Hist.* xxvii. 1361. I have not attempted to verify this statement of Impey's. It is most unlikely that he should have made it falsely. It is corroborated by some parliamentary papers referred to below. It is asserted by Sir Gilbert Elliot, in his printed speech, that Impey was mistaken, and that the instructions were sent out with the Charter of 1726, though he agrees with Impey and Boughton Rouse that the proclamation about English criminal law being in force in Calcutta was in 1762, and argues earnestly—from the fact that the English criminal law was not put in execution in Calcutta till 1762, against its introduction in 1726. The inference seems to be that it was introduced, or at least reintroduced as Impey says, in 1753, and put into force as soon as the course of events made the Company practically sovereigns in Calcutta.

“ does not understand English, directions how to proceed  
 “ when any Portuguese, Gentoo, or native of India, not  
 “ born of British parents, happens to be prosecuted for  
 “ any capital offence, which the instructions say ‘ will  
 “ ‘ probably often happen ;’ they are told that stealing  
 “ goods above the value of forty shillings out of a  
 “ dwelling house, above five shillings privately out of a  
 “ shop, warehouse, court-house, or stable, and from the  
 “ person above five shillings, is capital ; they are told that  
 “ the jury may mitigate the sum so as to make the offence  
 “ clergyable, and the clerk of the peace is directed to  
 “ mark the <sup>1</sup> judgment so mitigated to distinguish them.  
 “ They give precedents of indictments for all these crimes,  
 “ and add indictments for burglaries, highway robberies,  
 “ and horse-stealing, as cases ‘ likely to happen.’ In a  
 “ marginal note they are told in cases where any Act of  
 “ Parliament makes a crime felony, which was not so at  
 “ common law, the indictment must conclude ‘ against the  
 “ ‘ form of the Statute.’ They are directed ‘ to enlarge on  
 “ ‘ His Majesty’s princely goodness, who, on the humble  
 “ ‘ application of the Honourable Company, has thought  
 “ ‘ fit to extend his care and the benefit of his laws to  
 “ ‘ his most distant subjects in the British settlements in  
 “ ‘ East Indies.’ <sup>2</sup> This the directors desire ‘ may be done  
 “ ‘ the first time the Commission is put into execution.’ ”

<sup>1</sup> It should be judgments.

<sup>2</sup> It appears from the evidence given by Mr. Boughton Rouse before the Impeachment Committee that this was done. His evidence is as follows :

“ Q. Do you know anything of any notice of any intention to carry  
 “ the English criminal law into execution within the town of Calcutta ?

“ A. I have found amongst my papers a copy of a proclamation issued  
 “ by His Majesty’s justices for the town and district of Calcutta at their  
 “ Quarter Sessions held on the 3rd June, 1762, in which such an intention  
 “ is announced.” This proclamation is printed in Elliot’s printed speech.

An account dated 3rd March, 1788, of the trials before the Court of Quarter Sessions at Calcutta from 27th August, 1762, to 27th November, 1768, was <sup>1</sup>published as a parliamentary paper. It appears from it that in the course of those six years there were tried forty-five cases in which sixty-two persons were implicated. To judge from the names, most of them were natives, fourteen were Englishmen, and a few Portuguese. Twenty-one of the whole number were sentenced to death, nine <sup>2</sup> in one case. It is obvious that the most technical of all the rules of English criminal law was held to be in force in Calcutta, for when charges of larceny were tried the jury found the value of the stolen articles to be 10*d.* in order to avoid a conviction for grand larceny which would be capital.

Two of the cases tried were for forgery. On the 28th May, 1764, Francis Russell was convicted of forgery and sentenced to be whipped round the town at the cart's tail. What he had forged is not stated. On the 27th February 1765, occurs this entry: "Radachurn "Metre—forgery—guilty—death—pardoned." This conviction took place under the statute on which Nuncomar was tried and was naturally much relied upon by Impey. Copies of the proceedings before the Court, and of the correspondence consequent thereon, were published as parliamentary papers and laid before the House of Commons. The proceedings are of no interest. Radachurn Metre was convicted of forging a codicil to the will of one

<sup>1</sup> It is in vol. iv. of the Wellesley Papers at the India Office.

<sup>2</sup> The entry in this case is: *Names* (nine native names). *Crime*—Felony and murder. *Verdict*—Pleaded guilty to the felony. *Sentence*—Death. This is obscure, as it does not appear what the felony was. A note to the return says that the Company have no paper in their possession in Europe to show whether the sentences specified were carried out or not.

Coja Solomon. Upon this the Governor and Council were <sup>1</sup>petitioned by the "principal black inhabitants" in favour of the prisoner. They respited him "in order to give these people the fullest conviction of our lenity as well as justice, and in hopes that this man's condemnation will be a sufficient example to deter others from the committing of the like offence which is not held so heinous in their eyes." The directors answered by procuring a free pardon for Radachurn Metre. They pointed out some defects in the indictment and observed that upon the evidence "there appears but slender legal evidence to found a conviction upon," and concluded, "we are glad you have interfered in his behalf." Impey said <sup>2</sup> that after every inquiry he could not discover that the proceeding itself was ever censured or the law complained of by the inhabitants, and that the petition was based on the circumstance, that its existence was at the time unknown to the inhabitants. He adds, that as "the whole passed in the ordinary course of business, and accorded with all the other proceedings of the Court," he "esteemed it a full precedent, more especially as there had been a plain intimation from the Governor and Council, if the condemnation should not be sufficient to deter the natives from the commission of forgery, that the law would be enforced in future."

These arguments seem to have convinced at least one

<sup>1</sup> I have seen a suggestion that Nuncomar was one of those by whom this address was signed. A parliamentary paper purporting to be a copy of part of the consultations for 11 March 1705, is bound up in the volume of papers at the India Office which contains the evidence before the Impeachment Committee. It points the petition in question. Ninety-four names are appended to it, Nuncomar's name is not one of them. That of Mohun Persaud is fifth on the list.

<sup>2</sup> *Parl. Hist.* xxv. 1363.

most hostile critic. James Mill, who most strongly condemns the execution of Nuncomar, admits, <sup>1</sup>“There was, perhaps, enough to save the authors of this transaction on the rigid interpretation of naked law.” Leaving out the adjectives, which so determined a disciple of Bentham should have disdained, this amounts to an admission that what was done was probably legal. The fact that Mill does not dispute its legality, shows that he felt that the probability of it was high. Macaulay contents himself with observing “whether the whole proceeding was not illegal is a question. But it is certain that whatever may have been, according to technical rules of construction, the effect of the statute under which the trial took place, it was most unjust to hang a Hindoo for forgery.” This remark seems to me to show that Macaulay did not understand the question. Nothing turned either upon the construction of the statute 25 Geo. II. c. 2., nor upon the construction of 13 Geo. III. c. 63, nor upon that of the Charter, and I think Macaulay made use of the ambiguous expressions quoted, because he did not know his own meaning, and was afraid to be definite for fear of being wrong. The question was whether English criminal law in general and the statute, 2 Geo. II. c. 25, in particular had been introduced into Calcutta, and if so when?

The part of Sir Gilbert Elliot’s speech which was directed to this matter <sup>2</sup>is reported, as appears by comparing it with the printed speech, in a manner which though not incorrect is extremely summary. The report

<sup>1</sup> Mill (Wilson’s ed.), iii. 453.

<sup>2</sup> *Parl. Hist.* xxvi. 364. This follows the part of the speech revised by Sir Gilbert himself. It forms part however of the printed speech above referred to.

says "he referred to the Acts of Parliament, and to the "Charter constituting the Supreme Court. By the "former it was clear no power of criminal jurisdiction "was given." <sup>1</sup>(How this can be reconciled with the part of the Act which makes the Supreme Court a Court of Oyer and Terminer in and for Calcutta I cannot understand). "Under the latter he admitted it might "be contended that such a power did exist; but then on "what written authority could it be exercised? He "entered into a discussion of the question, whether a "King of England exercising sovereign power over a "conquered country had a right to extend his laws to "that country and subject the natives to their operation "without the consent of his Parliament. He denied that "he could, and pointed out the extreme danger that must "result to our constitution at home if a British king "could so far carry his prerogative royal."

This argument refers to a controversy which had then lately been raised by a <sup>2</sup>decision of the Court of King's Bench on the authority of the king to legislate for the island of Grenada, in which Lord Mansfield, in delivering the judgment of the Court, said that the king had power to legislate for conquered countries without the concurrence of Parliament. This view was controverted at the

<sup>1</sup> From the printed speech it appears that Sir Gilbert Elliot argued in substance that the assumption that Parliament could mean to exercise or authorise the exercise of criminal jurisdiction over any part of India, or to subject any natives of India, in Calcutta or elsewhere, to English criminal law was so monstrous that words appearing to assert the contrary must be "construed strictly," that is to say, explained away if possible. He would have construed the words quoted to mean, "over Englishmen born residing in Calcutta," which is clearly not their meaning.

<sup>2</sup> In the case of *Campbell v. Hall* (20 *St. Tr.* 239-354, especially 323-326).

time, especially by Baron Maseres,<sup>1</sup> but is now generally accepted and has, indeed, been recognised by Parliament, and exercised in many cases, both in India, in Ceylon, at the Cape of Good Hope, and elsewhere. Elliot also argued that Calcutta was not a conquered country, and in this argument he was supported, and even outrun, by Colonel Fullarton.<sup>2</sup> He considered that Calcutta was held neither by cession nor by conquest, "but by a particular tenure from the Nabob of Bengal, and under the paramount authority of the Great Mogul." In proof of this he referred to the various firmans issued by the Emperors of Delhi, especially to one issued,<sup>3</sup> he said, in 1764, before the grant of the Diwani, which said, "The Company must endeavour to drive out our enemies, and decide causes agreeably to the rules of Mahomet and the laws of our empire." This argument no doubt proved that

<sup>1</sup> See extracts from his *Canadian Freeholder* (20 *St. Tr.* 331). As to the recognition of *Campbell v. Hall* by Parliament (see 6 & 7 *Vic. c.* 94). This Act recites that "by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions," and that "doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the customs of this realm." It then enacts that any such power may be exercised "in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory." This implies that at common law the king's power to legislate for a conquered country is unlimited, for the object of the Act was to make his power to legislate, *e.g.* for British subjects in Constantinople, unlimited. As to this power, see my *History of the Criminal Law*, ii. 58-60.

<sup>2</sup> *Parl. Hist.* xxvi. 469-473. Elliot's printed speech shows that he went quite as far as Fullarton. He argues at enormous length, giving as a part of his argument what may be called a history of the establishment of the English at Calcutta, to show that the King of England had no powers in India except those derived from the grants of the native rulers. He could hardly argue in Parliament that Parliament had no such power, but he obviously thought so.

<sup>3</sup> This is not in Aitcheson's *Treaties*.



the trial of Nuncomar was illegal, but it also proved that the legality of the whole English establishment in Bengal depended upon, and was limited by, the rules of Mahomet and the laws of the Mogul empire. In other words, it proved too much.

It appears to me to be an argument against a fact. Conquest does not necessarily imply active warlike operations and a solemn proclamation of sovereignty. When it was, and is, said that India was conquered by the English, all that any reasonable person acquainted with well-known historical facts means to assert is that Englishmen gradually, by a series of operations, mostly military, acquired the control of all political power whatever throughout the country. A Court actually sitting under the authority of English statutes and charters, and refusing to recognise the king as the sovereign of the city in which they sat, would have been in contradiction with itself.

My own opinion upon the subject is as follows :—

The principles of law which apply to the matter are two.

1. When a possession is acquired by conquest or cession the king may by his prerogative introduce into it the law of England. If he introduces the law of England generally, this applies only to such parts of the law of England as are suitable to the circumstances of the newly-acquired territory. Whether any particular part of the law has been in fact introduced, or is suitable to local circumstances, is a question of detail to be decided as particular cases arise.

2. The king may by his prerogative legislate for possessions acquired by conquest or cession until he appoints a local legislature, but after the appointment of a local

legislature the king's right to legislate, otherwise than by an express Act of Parliament, determines.

This is qualified in Calvin's case, which is the root of this branch of the law, by these vague words: "<sup>1</sup> Also if "a king hath a Christian kingdom by conquest, as King "Henry II. had Ireland, after King John had given "into them the laws of England for the government of "that country, no succeeding king could alter the same "without Parliament." If Coke meant by this that the legislative power of the King over a conquered country was exhausted by introducing English law into it (as Sir Gilbert Elliot supposed), I think that his view has not been followed in later times. <sup>2</sup>In many of the Crown Colonies, and in various parts of India, in particular in the Panjab, the legislative powers of the Crown have been extensively exercised down to the time of the appointment of a local legislature. No doubt, however, this passage is favourable to the view maintained by Elliot and unfavourable to the one taken by Impey and his brethren.

That these principles apply to Calcutta cannot be denied, as they have been recognised in a long series of decided cases and parliamentary enactments. I will mention one strong instance of each. The case of the <sup>3</sup>*Mayor of Lyons v. the East India Company* proceeds throughout upon the principle that English law was introduced into Calcutta at a very early period, and

<sup>1</sup> Reports, 17b.

<sup>2</sup> A great number of authorities, on this matter are to be found in Forsyth's *Constitutional Law*, chapter i. p. 1-34. See especially p. 14-16.

<sup>3</sup> *Moore's Indian Appeals* 175, and see the cases reported in the Notes to it, especially *Freeman v. Fairlie*, in which I feel a personal interest, as it consists of a confirmation by Lord Lyndhurst of a report by Master Stephen, my grandfather, to which exception was taken.

decides that the particular rule that lands purchased by an alien are forfeited to the crown was not so introduced.

The statute 9 Geo. IV. c. 74 applies to the administration of criminal justice in the Supreme Courts, and abolishes amongst other things benefit of clergy and many technicalities as to indictments, &c. This is a distinct legislative recognition of the doctrine that in 1828 English criminal law was in force in the Presidency towns, but it was certainly not introduced generally by any earlier enactment subsequent to the Regulating Act and the Charter of the Supreme Court, though several other acts, *e.g.* the Charter Act of 1813, contained special provisions on the subject, and it is equally certain that it was not introduced for the first time in 1774. The question therefore is, at what time was the criminal law of England, so far as it was suitable to local circumstances, introduced into Calcutta? Was it introduced in 1661 by the letters patent of Charles II.? or in 1726 by the letters patent by which the Mayor's Court was established? or by the letters patent of 1753, which were issued when the patent of 1726 was surrendered? or in 1774 by the Charter of the Supreme Court? If I were to consider this question wholly apart from the later decisions bearing upon it, I should say that it was originally introduced to some extent in 1661, but that the later Charters of 1726, 1753, and 1774 must be regarded as acts of legislative authority whereby it was re-introduced on three successive occasions, as it stood at the three periods mentioned. When so introduced I think it would extend to all persons locally withip the jurisdiction, from the time when the East India Company began in fact to exercise exclusive powers of government there, and at all events from 1757, when they expelled and conquered

Suraja Dowla, and became substantially sovereigns of Calcutta and its dependencies, subject of course to their own sovereign George III. This in substance is Impey's view of the matter, and if it is correct, the trial and execution of Nuncomar were strictly legal.

I am, however, bound to say that this view is opposed to an opinion which is so firmly established in India, and has been so often acted upon by the courts and the legislature that it can hardly be disputed. <sup>1</sup> This view is that the date at which English criminal law must be taken to have been introduced into Calcutta was 1726, the date at which the Mayor's Court was first established by charter. If this is true, the Act under which Nuncomar was indicted was not at the time of his offence in force in Calcutta, as it was passed in 1728, and could not, therefore, be introduced in 1726. I have done my best to trace the history of this doctrine, but have failed to do so to my satisfaction. The early reports of the decisions of the Supreme Court are meagre. I have found a good many which decide on various grounds that this or that statute was or was not in force in Calcutta, but I have found no statement, in any decided case, of the rule that 1726 is to be taken as the date of the introduction of the English statute law; still less have I found any explanation of the reason why that date was chosen. Mr. Stokes points out that it is difficult to say why 1726 should be taken rather than 1661. The authority usually cited for the rule itself in Indian law books is a <sup>2</sup> paper written, about the year 1815, by Sir Edward Hyde

<sup>1</sup> My friend and successor-in office, Mr. Whitely Stokes, states this view and refers to many authorities in support of it in a note to the first page of a work called *The older Statutes in force in India* (Calcutta, 1874).

<sup>2</sup> Printed in *Minutes of Evidence*, vol. i. p. 125-133. See as the date of the papers Answers 1,323 and 1,286-7.

East, formerly Chief Justice of the Supreme Court, and given in evidence by him on the 9th March, 1830, to the Select Committee of the House of Lords, which was then taking evidence on East Indian affairs in preparation for the Charter Act of 1833. He says, "It is proper to remind Government that notwithstanding the Act of the 13 Geo. III. c. 63, and the king's Charter of 1774 granted under it" . . . . "the inhabitants of Calcutta" . . . . "have not the full benefit of the statute law of England to a later period than the thirteenth year of George I. unless expressly named. This has been the uniform construction of the judges of the Supreme Court since its institution: and whether right or wrong originally, the judges of the present day cannot depart from it without authority of Parliament.

"The period at which the general statute law stops in regard to this Presidency is that of the constitution of the Mayor's Court in Calcutta; when those who established that construction said upon the doctrine of Calvin's case that the British law was then first given to this as to a British colony, and that as a rule it could not be included in any subsequent statute unless specially named." He goes on at great length to show the inconveniences of this construction. For instance, he says that to obtain goods by false pretences was no offence in Calcutta, as 30 Geo. II. c. 24 did not extend to it. He adds: "A felon stood mute, and it was very doubtful whether it was not obstinately. If so found, he must have been put to the barbarous torture of *pain* (sic) *forte et dure*, instead of having judgment against him by the statute 12 Geo. III. c. 20; <sup>1</sup>but this is now better

<sup>1</sup> This sentence must have been added when the paper was sent before the Committee. It obviously refers to 9 Geo. 4, c. 74, s. 84.

“provided for by the Court ordering ‘a plea of not guilty to be entered for him.’”

Another consequence, which does not seem to have occurred to any one, ought to have followed, which would have practically closed the doors of the Court on the criminal side. All indictments ought to have been in Latin, as they were at common law, for the statute which required them to be in English (4 Geo. II. c. 26), was not passed till 1730.

I do not think it can be doubted that Sir Edward East states correctly what was in 1815 and in 1830 the opinion of the judges as to the law. <sup>1</sup>It is strongly confirmed by the contents of the statute, 9 Geo. IV. c. 74, already referred to, which introduced into the Presidency towns a great part of the criminal law of England as it stood in 1828. Thus <sup>2</sup>it enabled the Court to enter a plea of not guilty if a prisoner stood mute, and it made it <sup>3</sup>an offence to obtain goods by false pretences, <sup>4</sup>to embezzle money, &c., and to commit <sup>5</sup>many other acts of dishonesty which in 1726 were regarded as mere civil wrongs.

Sir E. East observes, “Thus by a mere technical rule “of doubtful application and extent” the population of Calcutta have been deprived of the benefits of British legislation, no other legislation having been substituted for it. Who first introduced that rule <sup>6</sup>I have been

<sup>1</sup> On this see a Charge to the Grand Jury of Calcutta by Sir E. Ryan, 13th April, 1829. Smoult and Ryan's Rules and Orders, Appx. xxxiv.-vi.-xlv.

<sup>2</sup> 9 Geo. IV. c. 74, s. 34.

<sup>3</sup> S. 106.

<sup>4</sup> S. 100.

<sup>5</sup> S. 97-105.

<sup>6</sup> I must here acknowledge a great obligation to Mr. Belchambers, who is the Registrar of the High Court, and was the Registrar of the Supreme Court, having thus held the same office for at least twenty-five years—a rare instance in Indian administration. Mr. Belchambers, who is probably better acquainted than any living man with all the matters

unable to discover. The doctrine of Calvin's case no one disputes, but why it should have been presumed to apply in 1726, and why the equally well-known doctrine of the legislative power of the Crown in conquered countries should not give validity to the Charter of 1753, and why the Regulating Act should not have been held to confirm, if they needed confirmation, the Charters of the Supreme Court, which obviously meant to extend the criminal law of England as it then stood, to Calcutta, I cannot understand. Two cases only of a long list supplied to me by Mr. Belchambers have any permanent interest in this matter, and they throw no light on its principles. The first is a case of <sup>1</sup>R. v. Collipersaud Ghose, who was tried in 1786 under 2 Geo. II. c. 25, s. 2 (the Act under which Nuncomar was tried) for stealing a bill of exchange. Chambers in this case held that the statute did not extend to Calcutta, Hyde held that it did, and Sir William Jones doubted, but the prisoner was tried, convicted, and imprisoned. This, as far as it goes, follows the decision in Nuncomar's case. On the 16th January, 1789, Martirus Shabin was convicted before the same judges of publishing a bond. The judgment was under the statute of 5 Eliz. c. 14—fine, imprisonment, pillory, and the cutting off of one ear. Of the reasons for the judgment given no record remains. The case is remarkable, because it shows either that Chambers was culpably timid in Nuncomar's case, or that he changed his opinion after that case was decided, for the statute on which connected with the Court of which he is the chief executive officer, has carefully examined for me the records of the Court, and favoured me with a most careful and elaborate note on them, which is my authority for much of what follows.

<sup>1</sup> Morton, 356. The statute put the theft of bills of exchange, &c., on the same footing as the theft of chattels of the like value.

Shabin was sentenced is the one of which Chambers suggested the application to Nuncomar.

There is only one further matter to which I need refer.

<sup>1</sup> The Charter Act of 1813 makes some additions to the criminal law of the Supreme Courts. One of these sections provides that upon the conviction of any person for the forgery or uttering of any deed, &c., he may be transported for any term to any place which the Court may direct. This provision was a practical settlement of the question for the future, but it does not throw light on the previous state of the law. It is consistent with the view that the punishment of death was considered too severe. It is also consistent with the view that the common law and the statute of Elizabeth were not severe enough.

Upon fully considering all these matters, I think that as a matter of legal theory Impey's view was, to say the least, defensible. It was certainly inconsistent with later decisions, but if it is regarded as being on that account wrong, I think that the mistake into which the Court fell was innocent and in good faith. Every one who has much practical acquaintance with law is well aware that in many cases it varies from time to time.

Is the presence of a priest in orders essential by the common law of England to a valid marriage? <sup>2</sup> No one can now deny that it is, but it is open to any one to think that the arguments of Lord Brougham, Lord Denman, and Lord Campbell, who thought it was not, were better than those of Lord Lyndhurst, Lord Cottenham, and Lord Abinger, who thought it was, although the last three judges prevailed over the first three, because the question

<sup>1</sup> 53 Geo. III. c. 155, s. 114-122. See especially sec. 115.

<sup>2</sup> R. v. Millis (10 Cl. & Fin. 534).



was whether Millis was guilty of bigamy, and the rule is *presumitur pro negante*.

In a contract of life assurance is it essential that the interest of the assured should be in existence when the sum assured becomes payable, or is it sufficient if it was in existence when the contract was made? In 1807 the Court of King's Bench <sup>1</sup> held that the interest must continue to the death. In 1854 the Court of Exchequer Chamber <sup>2</sup> held the opposite.

Is a man who kills another in a duel guilty of "meurtre" under the French Code Penal? From 1810 to 1828 the Court of Cassation held that he is not. Since 1837 it has held the opposite.

These examples, which might be multiplied to any extent, show that it is not at all surprising that the Supreme Court should at one time have held that the criminal law of England as it was in 1753 was introduced into Calcutta in so far as it was applicable to local circumstances, and that it should have held at another time that the date was 1726. If the date 1753 was taken, I do not see that the Act in question was less applicable to Calcutta than it was to London.

It must, however, be said that in a doubtful and novel matter of this sort the Court would have acted wisely in saying that an indictment for the forgery as a misdemeanour at common law would be the proper course to take. A conviction upon such an indictment would have been followed by fine and imprisonment to any extent which the Court thought proper, and this would, I think, have been under all the circumstances a punishment sufficient for the ends of justice. No doubt it was

<sup>1</sup> *Godsall v. Boldero* (9 East, 71).

<sup>2</sup> *Dalby v. London and India Life Assurance Society* (15 C. B. 365).

then true that when an act which at common law was a misdemeanour is made a felony by statute, the misdemeanour merges in the felony, but the offence need not have been described in the terms of the statute. The bond I think was a writing obligatory,<sup>x</sup> but if it had been described as "a certain contract in writing in the words "and figures following," Farrer would hardly have objected that a felony in which the misdemeanour was merged had been proved and that Nuncomar must be acquitted of the misdemeanour to be <sup>1</sup> indicted capitally. Sir William Jones recommended this course in a charge to the Grand Jury of Calcutta in 1785 when he said, <sup>2</sup> "In "all cases of forgery permit me to recommend indictments "for the misdemeanour only, since very strong arguments "have been used both at home and here to prove that "the rigour of our modern law in punishing that crime "with death cannot be legally extended to these provinces. "I give no decided opinion yet on that point, nor on "another which may be started, whether if the crime "under consideration be a capital felony in India, an "indictment will also lie as at common law, since it has "been held that a felony merges or absorbs a misdemeanour." I say that I think this would have been wise, but strictly speaking, it is not the part of the Court to say how or for what a prisoner is to be indicted. The

<sup>1</sup> I remember a case of concealment of birth tried many years ago at Derby, in which the counsel for the prisoner objected that, whereas his client was accused of concealing the dead body of her child by throwing it into a cesspool, she was shown by his cross-examination to have thrown it in whilst living. The judge (I think the late Mr. Justice Willes) observed, "If your contention succeeds your client will be committed for "murder, lie in gaol for six months, and then be tried for her life. If "it fails, she will probably get her sentence over before the next assizes."

<sup>2</sup> Works, vol. vii. p. 12.

prosecutor draws the indictment as he thinks proper, though as a rule the officer of the Court is the actual draftsman. The master of the Crown Office tells me that in former times indictments presented in the Court of King's Bench by private prosecutors were drawn by one of the masters for a fixed scale of fees according to the prosecutor's instructions. Probably the same course would be followed in Calcutta.

I cannot find the smallest trace in any part of the argument on this subject, or in any of the speeches on the impeachment of Impey, that any one took the point about the date at which English law was introduced into Calcutta. Chambers's doubt was as to the suitability of the English law of forgery for Calcutta.

In his printed speech Sir Gilbert Elliot does certainly mention the point, but as his argument was that the Supreme Court had no criminal jurisdiction at all over any native of India in Calcutta or elsewhere, he did not give it the prominence which in my view ought to have attached to it.

The next charge against Impey is that whether the proceedings were legal or not, his conduct at the trial was unjust. The injustice alleged is summing up with scandalous partiality, and the manifestation throughout the proceedings of great anxiety to secure Nuncomar's conviction.

As to this, I can only refer to the account already given of the trial, and to the reprint of the summing up. My opinion is that the trial was scrupulously fair, that the summing up was perfectly impartial and gave every possible advantage to the prisoner. So far from tracing in Impey's conduct any wish to secure at all hazards the conviction of Nuncomar, I think he would have been

well pleased at Nuncomar's acquittal, as it would have saved him from a painful duty and a heavy responsibility.

<sup>1</sup> As far as appears from the reports in the parliamentary history, little was said upon this part of the accusation by those who took part in the debate. I have referred in notes to the summing up to some isolated remarks, because it is easier to understand them when they are read in connection with the matters referred to than to state independently their nature and bearing.

The third accusation against Impey, which involves an accusation against Hastings also, is that they conspired together to cause Nuncomar to be tried and convicted on a capital charge. It was not pretended that there was any distinct proof of this conspiracy, indeed, as I have already shown, it was not even directly alleged in the articles of charge that such a conspiracy ever existed. The allegation there made is that circumstances existed which gave ground for a suspicion of a conspiracy. These circumstances were these—first, the interest of Hastings in getting rid of Nuncomar; secondly, the coincidence in point of time between the accusation of Hastings by Nuncomar and the accusation of Nuncomar by Mohun Persaud; thirdly, the illegality of the proceedings against Nuncomar; fourthly, the unfairness of the conduct of Impey at the trial; fifthly, his conduct after the trial in refusing leave to appeal and refusing a respite.

All this seems to me unsatisfactory guesswork upon incomplete materials. There can be no doubt that Hastings had an interest in Nuncomar's being discredited,

<sup>1</sup> Sir Gilbert Elliot's printed speech ends abruptly before this matter is reached. See vol. i. p. 170. I did not see the printed speech till after that passage was sent to the press.

though I think it would be too much to say he had any special interest in his death. The coincidence in point of time between the accusation of Hastings by Nuncomar and that of Nuncomar by Mohun Persaud was by no means close. Nuncomar appeared before the Council to charge Hastings, March 13th. He was committed for trial on the charge of forgery, May 6th, nearly eight weeks afterwards.

As to the illegality of the proceedings against Nuncomar, if there was any illegality it was certainly not known to or suspected by the judges, but incurred in good faith by all four of them, and not by Impey more than the others. The alleged unfairness of Impey at the trial did not in my opinion exist, and for reasons to be hereafter given, I think that the refusal of leave to appeal, if it was refused, and the omission to respite Nuncomar, for neither of which was Impey in any special way responsible, were the acts of the whole Court done in good faith. Where then is the evidence of any conspiracy? It is reduced to the interest which Hastings had in Nuncomar's death, and the coincidence such as it is in point of time between the two accusations. That this is ground for a vague passing suspicion is, I think, true : that it is anything more may be easily disproved. It can be accepted as proof of a conspiracy between Hastings and Impey only by a person who is prepared to assume in general terms that whenever any one in whose death A has an interest dies under such circumstances that B, a friend of A's, may possibly have caused that death by criminal means, A and B must be presumed to have conspired to murder the deceased. One consequence of such a rule would be that if a doctor were the friend of the heir to a large fortune, and the medical attendant of the owner, and if the owner

died whilst the doctor was in attendance on him, the doctor must be presumed to have poisoned him.

It is undoubtedly true, as Sir Gilbert Elliot said, that a criminal conspiracy may be, and indeed generally is, proved by the conduct of the parties, and not by direct evidence of a written or verbal agreement to do something unlawful; but mere friendship between two persons, one of whom has or may have a reason to wish a crime to be committed which the other has means to commit, and which may or may not have taken place, is not enough. It is the interest of the owner that a ship insured should be lost at sea. The captain is his friend and the ship is lost at sea. It is monstrous to say that these facts alone raise a presumption of a conspiracy between the owner and the captain irrespectively of the circumstances of the loss and the conduct of the captain.

One of the peculiarities of the charge made against Hastings and Impey is this: A conspiracy implies and must be proved by the conduct of at least two persons jointly pursuing an unlawful purpose. This is not done in the present case. It is suggested that Hastings had a motive for wrong doing, and that Impey misbehaved himself, but no act of any description tending, however remotely, to show a conspiracy with Impey, was ever even imputed to Hastings. The following would be an exactly parallel case. The owner of a ship has an interest in its being lost. It is lost, and there is evidence that it was lost by the misconduct of the captain. Is this evidence of a conspiracy between the owner and the captain? At the very utmost it may be ground for a suspicion that such a conspiracy may have existed. This is a stronger case than that of Hastings and Impey, for the captain of a ship is the owner's agent for many purposes, and is usually

appointed by and dependent on him, but Impey was not Hastings's servant. He had not been appointed by and was wholly independent of him.

For these reasons it seems to me that the coincidence of time between the two accusations, however fitted to strike the imagination and to excite a vague suspicion against Hastings, ought not to be regarded as sufficient evidence to render guilt on the part of Hastings probable even in a low degree.

To suppose that the matters stated prove anything as against Impey is to show either ignorance or looseness of thought, for the argument assumes that Impey had something to do with the early steps in the case, and so with the time when the case was brought before him. This is contrary to the fact. Whatever wickedness is imputed to Impey, he could not interfere with the time when the prosecution began. His opportunity of misconducting himself would not arise till the prisoner was brought before him by others. He was not even the committing magistrate. Nuncomar was committed by Hyde and Lemaistre, who could not, when Mohun Persaud swore an information before them, refuse to proceed, or, if they thought it a case for committal, to commit. When Nuncomar was committed his trial at the next session was a matter of course, over which none of the judges had any influence whatever. I have already pointed out the absurdity of the language of the article of impeachment which implies that on barely hearing a report that Nuncomar had accused Hastings of corruption, Impey ought to have refused to try Nuncomar for forgery. The readiness with which Macaulay and Mr. Merivale accept the conclusions which the impeachment draws mainly, if not entirely, from the

circumstance that the two accusations coincided in time makes me think that Macaulay overlooked a matter with which he never had any practical familiarity, and that Mr. Merivale for the moment forgot what his early experience at the bar must have made perfectly familiar to him—the facts, namely, that a judge cannot exercise any discretion whatever over the time or place of the trials which take place before him, and that when a man is solemnly accused of a crime, the judge can do nothing but try him.

These considerations are enough to show that even if the coincidence in time between the two accusations were unexplained it would prove nothing against either Hastings or Impey, but it was explained by the evidence of Boughton Rouse and Farrer already referred to. Boughton Rouse shows what the nature of the civil proceedings was, and how they stood when the Supreme Court arrived in Bengal. Farrer takes up the story at the point at which Boughton Rouse had left it, and shows that the criminal proceedings grew naturally out of the civil suit, and were carried on as quickly as circumstances allowed. In particular Farrer proved that the prosecution of Nuncomar for forgery had been determined on long before Nuncomar accused Hastings of corruption, and explained the circumstances which led to the warrant not being issued till May, 1775. It must have been issued within a very few days after the forged deed was procured by the solicitor of the prosecutor, and it could not have been issued before.

For these reasons it appears to me that there was absolutely no evidence that there was any conspiracy between Hastings and Impey in reference to Nuncomar's trial.



I know that I am somewhat singular in this opinion, and that at least two eminent writers—Macaulay and Mr. Herman Merivale—affirm the contrary, with a confidence which astonishes me. Mr. Merivale says, “<sup>1</sup>When Hastings, through Sir Elijah Impey, the chief justice, took Nuncomar’s life by way of reply” (to Nuncomar’s accusations), “Francis seems to have been paralysed by their determination. This judicial murder, for such it undoubtedly was, &c.” Mr. Merivale gives no reason at all for his assertion. Macaulay characteristically asserts that “every one, idiots and biographers excepted,” believes that Hastings was the real mover in the prosecution of Nuncomar, and that “no rational man can doubt” that Impey took the course of refusing to respite Nuncomar “in order to gratify the Governor-General.” It is to be regretted that Macaulay did not add a little scepticism to his other accomplishments, but his faith was great, and throve at times on what seems very insufficient food. In this particular case he condescended to give something of a reason for the faith that was in him, and indeed he seems to admit the possibility that he might not have been absolutely certain of Impey’s subserviency to Hastings (though in fact he was so), but for a piece of evidence supplied by Mr. Gleig: “If we had ever had any doubts on this point, they would have been dispelled by a letter which Mr. Gleig has published. Hastings, three or four years later described Impey as the man to whose support he was at one time indebted for the safety of his ‘fortune, honour and reputation.’ These strong words can refer only to the case of Nuncomar, and they

<sup>1</sup> *Life of Francis*, ii. 34.

“must mean that Impey hanged Nuncomar in order to support Hastings.”

The argument founded on this letter appears to me to be worthless. The exact date of the letter is not given by Mr. Gleig, but it must have been written in 1780, at the height of the contest between the Governor-General and Council and the Supreme Court to which it relates. The full phrase is <sup>1</sup>“I feel an injury done me by a man “for whom I have borne a sincere and steady friendship “during more than thirty years, and to whose support I “was at one time indebted for the safety of my fortune, “honour and reputation, with tenfold sensibility. And “under every consciousness of the necessity which has “influenced my own conduct and the temper with which “I have regulated it, I am ready to pass the most painful “reproaches on myself on the least symptom of returning “kindness from him.” There is much more to the same purpose. It is remarkable that a passage to the same effect appears in a letter from Impey to Dunning in March, 1780. Impey says, “The power which is exerted “against me would not have existed in the hands in “which it is if I had not helped to keep it there, and it “was used against me at the time when I was living, in “all appearance, in the utmost confidence of familiarity “with the possessor of it.” . . . “This has hurt me “much more than any anxiety which I felt during all the “time that I knew Clavering was endeavouring to ruin “me in England.” Is this the language of two murderers about each other? Would one such wretch look back with affectionate regret to the happy time when by the hand of the other he assassinated their common victim? Would he say of him to a common

<sup>1</sup> II. 255.

friend "Dear Impey," or "dear Hastings, how sad it is to see how different his present feelings to me are from what they were when he helped me to murder Nuncomar some years ago"? If there was such a bond of infamy between two men, each would shun all reference to it, especially to a third person, as he would shun the avowal even to himself of any other abominable and horrible crime. Macaulay's supposition is not only revolting and improbable, but also quite unnecessary. Each of these passages, to my mind, obviously refers to the support given to Hastings by Impey and the rest of the judges, when Clavering tried to dispossess Hastings from the office of Governor-General, in the summer of 1777, in the manner related by Macaulay himself, and when Hastings was secured in his office entirely by the view taken of the case by the judges to whom the rival claims of the parties were referred.

Mr. Beveridge draws from the coincidence of dates and one or two other circumstances on which I have commented in the course of my narrative, the inference that "the prosecution would never have occurred had not Mohun Persaud been suborned by Hastings or his friends"—he appears to think it does not matter which it was.

Notwithstanding this body of opinion, I go far beyond the assertion that there is no evidence of a conspiracy between Hastings and Impey. The circumstances when fully considered, appear to me to render the supposition of such a conspiracy improbable in the highest degree. I think indeed not only that there is no evidence that there was any such conspiracy, but that there are reasons as strong as can in such a case be produced to show that there was no conspiracy, though of course it is impossible absolutely to prove such a negative.

Many circumstances lead me to this conclusion, none of which appear to have occurred to those who have written on the subject, though they seem obvious enough to any one who considers the matter with a lawyer's eye. They are of two kinds, first the difficulties of the undertaking which render it unlikely that such a conspiracy would be set on foot, and secondly the conduct of the parties which make it improbable that it was in fact entered into.

First with regard to the difficulties of the undertaking. When it is said that every one but an idiot or a biographer believes that Hastings was "the real mover in the prosecution," the question immediately occurs, what is meant by being "the real mover" in a prosecution? If Hastings had been in such a position that a mere expression of his wishes, like the expression attributed to Henry II in reference to Thomas a'Becket, would have been sufficient to cause Nuncomar's destruction, it might have been said that to call for definite proof of the use of such expressions would be to require too much, but Hastings had no power of the sort. If Nuncomar was to be judicially murdered, it was necessary that he should be prosecuted in the common way, and that every legal form should be strictly complied with. To be the "real mover" in such a business it was necessary that Hastings should pay, or guarantee the payment of the expenses, employ by himself or his agent the solicitor who got up the evidence, or take some other definite substantial part of the same kind in the proceedings. He did actually prosecute Nuncomar for conspiracy, and his letter to his agents describing the steps he took to test the truth of Comaul O' Dien's statements, and his fear of being engaged in an ill-founded prosecution, clearly show how fully he appreciated the danger of such a step. But the prosecution of

Nuncomar for forgery would be an undertaking in every way infinitely more dangerous and difficult than his prosecution for conspiracy. The prosecution for conspiracy Hastings both could and did avow. Its success depended upon the credit given to the evidence of a single witness, and on the view taken of statements made by Nuncomar's co-defendant Fowke, before the justices. The prosecution for forgery was altogether a different matter. It was an incident in one of those obscure intricate native quarrels which as Hastings's long experience must have taught him, [are hardly intelligible to Europeans. To suppose that he would suddenly mix himself up in such a matter as the suit between the executor of Bollakey Doss and Nuncomar, is like supposing that a man would rush into a chancery suit to which he was not a party. A man who embarked in such an undertaking would be morally certain to fail ignominiously. The enterprise would be possible only to a person intimately acquainted with the details of the earlier litigation. That Hastings, in his capacity of Governor had been the nominal head of the Court before which that litigation took place, is true. But it is equally true that he knew no more of the details of the business in it than the Chancellor of the Exchequer used to know of the business of the Court of Exchequer.

Nuncomar's attack upon Hastings was made on the 13th March. All sorts of contrivance, consultation, study of native documents and books of account in various languages and in an imperfect state, would be necessary before a prosecution could be entered upon. But till April 24th the deed alleged to be forged was in the custody of the Court with many other papers in the case.

About this time they were delivered to Mohun Persaud, and Nuncomar was arrested on the 6th May. How was Hastings, who was previously ignorant of the dispute, to get it up and prepare to commence proceedings in the course of ten or twelve days? There is not the smallest proof, there is not even any suggestion that Hastings ever made any such investigations personally, or by a solicitor. In the trial for conspiracy, Hastings was examined as to his connection with the prosecution for forgery. He emphatically denied it. No question was asked as to whether he had made any such inquiries as must have been made, whether he had employed or advised with any solicitor or whether he had paid or guaranteed the expenses, whether he had taken any steps to get up evidence, &c. In short, no one act or omission on his part was alleged or suggested by the counsel who cross-examined him to show that, notwithstanding his denial, he in fact was the "real mover" in the prosecution. In so small a society any such proceedings on his part would have been reported to the parties concerned, and might have been brought to light by cross-examination.

Consider for a moment the only specific suggestion ever made about Hastings's part in the prosecution. Mr. Beveridge suggests that Hastings or his friends "sub-orned" Mohun Persaud to prosecute. Is this likely? Mohun Persaud, as Nuncomar himself said, was Nuncomar's bitter enemy, and his enmity was independent of, and as far as appears unconnected with, any which may have been felt by Hastings, and there would therefore be no difficulty as to his motive for prosecuting Nuncomar even if it had not been explained. In the second place (which is much more important, and to my mind decisive)

<sup>1</sup> Mohun Persaud had been acting as attorney for the executor Gungabissen in the civil proceedings from 1772 to the latter part of 1774, and thus he must have been minutely acquainted with every point in the case which Hastings neither was nor could possibly be. Now to charge a man with forging a deed in a private transaction between merchants who had many dealings and cross accounts is what no sane man would do unless he were acquainted with all the details and with the relations of the parties. Mohun Persaud had according to his own account (which is corroborated by Boughton Rouse's evidence), suspected from the very first that the deed was forged. He knew all that could be known as to the relations between the parties, as to what appeared in their papers and accounts. He knew that the alleged debt of Bollakey Doss to Nuncomar did not appear in his books, that the language of the bond was in itself suspicious and that the transaction which it recited could hardly have taken place. Hastings knew none of these matters and was hardly likely to take Mohun Persaud's word for their existence. We have seen how cautious he was in giving credit to Commaul O Dien on a much simpler matter and how he hesitated before acting on his statement. Why in a matter of incomparably greater intricacy and importance should he repose blind confidence in Mohun Persaud, even if Mohun Persaud asked for his aid or countenance? Much more, why should he or his friends "suborn" Mohun Persaud to prosecute? Who would go out of his way to bring about such a step (and "suborn" must at the very least mean this), unless he knew the details of a most intricate

<sup>1</sup> Evidence of Mr. Boughton Rouse before the Impeachment Committee, p. 30.

affair? How could Hastings or his friends tell that Nuncomar might not have documents clearly proving that the transaction was a thoroughly genuine one, that he might not *e.g.* have a receipt for the jewels referred to in the bond, correspondence about them, and in particular the original of some such document as the Karar-nama which Kissen Juan Doss said he had seen and on which Impey remarked that if the jury thought it had ever existed it would be the height of injustice not to acquit the prisoner?

<sup>1</sup> To rush prematurely into such a prosecution would be to court defeat and disgrace. Yet it is supposed that upon some vague suggestion that Nuncomar had committed some forgery which affected Mohun Persaud, Hastings and his friends, who could know nothing of the details, "suborned" him (whatever that may mean) to prosecute.

It may be asked whether Mohun Persaud in carrying

<sup>1</sup> These considerations were forcibly impressed upon my mind by a case which it was my duty to try as these sheets were being printed. It was the case of *R. v. Thomas* and others for forging the will of James Whalley, tried at the Central Criminal Court November 24th-29th, and December 1st and 2nd, 1884. An accomplice and one of the persons afterwards convicted made statements to the solicitor for the prosecution, minutely describing the part they had taken in the crime. He did not act upon them, nor would any prudent man, I might say any man in his senses, have done so until they had been corroborated by all sorts of collateral evidence in a way which showed that their authors, bad as they were, had on that matter told the truth. It was shown by elaborate examination that the will itself bore marks of fraud, and that its provisions were inconsistent with letters written and acts done by the testator before, at, and after its alleged execution. The collection of this evidence was a matter of months, and no one would have been capable of collecting or even understanding it who had not mastered the details of more than a year's previous litigation which had ended in a compromise subsequently set aside. Prosecutions of this sort grow from deep roots.



on this prosecution was in no degree influenced in his own mind by the events which were passing in Calcutta? I think he probably was. He seems to have set the prosecution on foot before the quarrel between Nuncomar and Hastings took place, and he probably rejoiced when it did take place as he may naturally have thought that the Supreme Court was not independent of the Governor-General, and would not be just to his accuser. He may also have expected that most of the jurors would be prejudiced against Nuncomar as an enemy to the European interests, as Gilbert Elliot long afterwards avowed that he was; but it does not follow that the Supreme Court was corrupt, or that the jurors were prejudiced, or that the trial was unfair because Mohun Persaud may have been encouraged in his prosecution by the hope that this would be so.

If Hastings interfered in the prosecution, he incurred a tremendous risk of utter ruin for no reason at all. Nuncomar had made his accusation. He had named the persons who could support it. He had put the majority of the Council into a situation in which even after his death they could, if so minded, carry on the prosecution of Hastings. Hastings on the other hand had prosecuted Nuncomar for conspiracy, and procured his committal for trial. Each had done his worst against the other. Why in such circumstances should Hastings embark on a second prosecution which would embarrass the first, and which was in itself speculative and dangerous in the highest degree? Nuncomar was all but acquitted as it was. The immediate cause of his conviction was his own want of judgment, combined with the effect produced upon the jury by the mass of perjury put forward in his defence, but Hastings could not know that he would take the

course which in fact he did take. If he had guiltily furthered Nuncomar's prosecution he must have had before him the fear that Nuncomar or his advocate would turn upon him, and would say publicly in Court—I have no witnesses, the witnesses to the deed are dead; I cannot refute specifically an accusation five years old, but I say that my real crime is that I have accused the Governor-General of corruption, and he wants to put me out of the way. How could Hastings tell that such a defence would not be made and would not succeed? and if it had succeeded, what would have been the consequence but utter irremediable ruin and disgrace? What was there to prevent it? Farrer had only to write for Nuncomar a short speech no longer than the letters which Nuncomar himself wrote to the Council and to Clavering, and to have it read by the officer of the Court, and all would be done. How could Hastings know that he would not do so?

Of the opportunities which the case afforded for cross-examination and of its absence I have already spoken at length.

Again, consider what Hastings could have done. His object was to destroy Nuncomar. Now any one who will study the trial of Nuncomar will I think agree with me in the opinion, that the case for the prosecution was far from being overwhelmingly strong. It was little more than a *primâ facie* case. It was moreover far from being so strong as it might have been; for the proceedings in the civil suit in the Mayor's Court, which as Farrer himself admitted were so full of suspicious circumstances that he would not put them in for the defence, were not put in by the prosecution. Is it likely that Hastings, having resolved on Nuncomar's destruction, would have

prosecuted him so inefficiently? Hastings either knew of these proceedings or he did not. If he did not, how could he prosecute at all? If he did, why did he not put them in?

If Hastings were capable of corrupting judges, he was also capable of suborning false witnesses. Why did he not do so? Obviously he did not, but was he the man to commit a crime by halves? Was it likely that he should in some mysterious way corrupt four judges, and yet neglect the precaution of giving them the evidence which would secure and justify them in carrying out their part of the bargain?

This introduces the next difficulty in the way of supposing that there was a conspiracy between Hastings and Impey. Impey was but one of four judges, and he had absolutely no power in the matter of Nuncomar's trial which was not equally possessed by all of them. If therefore Hastings was the real mover in the prosecution, and was determined to secure a verdict, it would be necessary not merely to corrupt Impey, but to corrupt the other three judges and all the twelve jurymen.

The way in which Macaulay, Mr. Merivale, and Mr. Beveridge overlook this matter appears to me a proof of culpable haste in their judgment. The way in which this argument was dealt with by Sir Gilbert Elliot in his motion for the impeachment seems to me uncandid.

Macaulay and Mr. Merivale take absolutely no notice of the existence of the other three judges. Sir Gilbert Elliot misstates Impey's argument founded on this fact and gives a wholly irrelevant answer to it. <sup>1</sup> Impey justly remarked that he was but one of four judges, the authority of each of the other three being equal

<sup>1</sup> *Parl. Hist.* xxvi. 1412, 1413.

to his own, <sup>1</sup> that they were unanimous throughout, that two of them were still administering justice in India, namely, Chambers who succeeded him, and <sup>2</sup> Hyde who held office till he died in 1796, that he had no motive for partiality which was not common to all. It also appeared from Farrer's evidence, given between Impey's defence and Sir Gilbert Elliot's accusation, that Impey took a less prominent part in the matter than Lemaistre and Hyde, who committed Nuncomar, and who, according to Farrer's evidence, asked most of the questions which were asked of Nuncomar's witnesses. It is true that Impey summed up the evidence, but each or any one of them might also have summed up if they thought it necessary, and by their silence they acquiesced in what he said.

To all this Sir Gilbert Elliot replied <sup>3</sup> that he never heard that an accomplice could plead in his defence the impunity of others, that "Mr. Paley, in his *Chapter of Crimes and Punishments*, says that if crimes are committed by a gang it is proper to separate in the punishment the ringleader from his followers," that in many respects Impey was a ringleader, and that in his opinion "the punishment of the Chief Justice alone will answer all the ends of justice." This would have been to the purpose if Impey's argument had been that it was unjust that he alone should be singled out for punishment from four persons equally guilty, but it is irrelevant to the argument that it was morally impossible that Hastings should have conspired, not only with him, but with three

<sup>1</sup> An alleged exception to this unanimity I pass over here to discuss it below.

<sup>2</sup> Lemaistre died in November, 1777, Hyde in July, 1796, Chambers in 1803 (*Echoes of Old Calcutta*, 71).

<sup>3</sup> *Parl. Hist.* xxvii. 383-384.

other persons, to whom no one ascribed guilt and who must have been as guilty as he if any one was guilty at all.

As to the jurymen, no one ever asserted that any attempt was made to corrupt them. No one has ever produced, or will ever be able to produce, from the report of the trial a word used by any of the judges which could have the least tendency to persuade the jury to find a verdict of guilty, or to intimidate them had they been capable of intimidation, into finding such a verdict. The pannel was returned by Macrabie, the brother-in-law of Francis. Nuncomar challenged <sup>1</sup>eighteen jurymen. Touchett, afterwards the leader of the agitation against the Supreme Court, sat on the jury. Upon all this Sir Gilbert Elliot appears to have been absolutely silent, but surely these are points of the first importance. They do not seem to have occurred to either Macaulay or Mr. Merivale. I think, however, they might properly have said that the jury were not unlikely to be prejudiced against Nuncomar on account of his enmity to the English, and partly, perhaps, on account of his having revealed, or professed to reveal, corrupt practices. This consideration does not of course affect the value of the evidence itself, but it diminishes the value of the verdict apart from the evidence.

Passing from this, by what motive could Hastings have corrupted Impey or any of his brethren? Impey was no doubt his old friend. They had been school-fellows and had known each other for thirty years, but mere personal friendship is at once too amiable and in common cases too weak a motive to induce a man to commit the foulest of all murders and it certainly did

not prevent Impey from acting afterwards in a way which was in the highest degree unwelcome to Hastings. Besides, this motive affected Impey alone out of the four judges to be corrupted. If men were capable of being seduced into so dreadful a crime at all, it could be only by coarse, gross, tangible motives, by bribery in the shape of money or office, or some other palpable advantage. It has never been alleged that Hastings bribed the judges in any of these ways. He could not do so by a job of any sort without the consent of the Council, and to say nothing of the danger of asking their consent for such a purpose he was sure not to get it, for he was in a minority.

It has been alleged that five years after the trial and execution of Nuncomar, Hastings bribed Impey to sacrifice pretensions made by the Supreme Court by giving him the place of judge of the Sudder Diwani Adalat under the Company, with a large salary. On this I shall have something to say hereafter, but in the meantime I may observe that, whatever may be the weight of that accusation, it is not alleged either that it had any connection with Nuncomar's case, or that before that time Impey received any valuable consideration whatever from Hastings for the murder in which he is said to have taken part. The same is true of the other three judges and of the twelve jurymen. Why should all these sixteen persons commit so frightful a crime without any motive whatever? There can be no question as to the nature of the crime imputed. Sir Gilbert Elliot said of it, no doubt in characteristically exaggerated language: <sup>1</sup> "I do solemnly declare that of all the enormities I have ever heard of in the tyranny of man over man, of all desperate or wanton exploits either recorded in the

<sup>1</sup> *Parl. Hist.* xxvii. §21.

“ history of human crimes or conceived in the most extravagant and the wildest flights of imagination and “ invented guilt, this one detestable act has always appeared to me to involve within its single self the “ greatest variety, the greatest complication, the most “ lofty accumulation of guilt, to stand the highest in the “ scale of offences, and to claim an undisputed pre-eminence “ in human crimes.”

At the end of this speech <sup>1</sup> Sir Gilbert Elliot said that “ he had he trusted sufficiently established the crime ; “ it remained only to prove the corrupt motive, and he “ admitted that unless a corrupt motive could be proved “ the impeachment ought to fall to the ground. The “ motive was to be judged of by the tendency and effect “ of the crime. The tendency was to impress the natives “ with the idea that to accuse any person in power would “ be fatal to the accuser, and such was the effect, for that “ such an idea was entertained at that time was proved “ in evidence.”

<sup>1</sup> *Ibid.* 437. Sir Gilbert Elliot's words state the established doctrine of the eighteenth century Whigs about motive, devised, no doubt, because of its supposed bearing upon the law relating to libel. I think it is based upon an ignorant confusion between motives and intentions. As to this see my *History of the Criminal Law*, ii. pp. 110, 360. The absurdity of the Whig theory is well illustrated by this case. If Impey really did conspire with Hastings to destroy Nuncomar, or really did try him unfairly, what did his motives matter? If they were as good as possible he would still be a judicial murderer and an unjust judge. If they were as bad as possible he could be no more. If, on the other hand, Impey tried Nuncomar fairly and did not conspire with Hastings, what did it matter if he had motives for doing the contrary? The existence of a motive for guilt is always an important article of evidence in determining whether the guilt exists, but it can hardly ever form a constituent element in the guilt itself, according to the Whig theory. I know of only one exception to this rule. The motive is included in the definition of the crime itself in 24 and 25 Vic. c. 100, s. 53, which relates to the abduction of women “ from motives of lucre.”

As to motive, Elliot's argument comes to this: No crime is committed without a motive. But here a crime has been committed. There must therefore have been a motive. As there is no evidence of any specific motive, the motive must be inferred from the effect of the crime. But the effect of the crime was to intimidate natives from making complaints of Europeans. Therefore, four judges and twelve jurors unanimously agreed to commit a fearful crime in order to intimidate natives from complaining of Europeans.

Thus, in Sir Gilbert Elliot's view, the crime proved the motive and the motive proved the crime, but apart from this I do not think it credible that for a mere general political motive a large number of persons would band themselves together to commit an odious crime, in which no one of them had any direct personal interest. The jury may have been prejudiced, but all Calcutta jurors were certainly not blind partisans, for if they were, why was Nuncomar acquitted on the charge of conspiracy against Hastings? As for the judges, the crime imputed to them is of a different kind and degree from that which is imputed to the jury. It is that for a general political motive, in which no one of them had any direct personal interest, they first applied to Nuncomar's case, a law which to their knowledge did not apply to it; secondly, conducted his trial partially; thirdly, refused him leave to appeal; and fourthly, refused to respite him, acting in each case with full knowledge of the illegality or injustice of their conduct, and in order to put to death a man who, if guilty at all, was guilty of a comparatively trifling offence. Did any four men ever conduct themselves in such a manner for such a motive?



Apart from this, did the motive suggested influence the judges of the Supreme Court at all? Were they likely to wish to prevent natives from complaining of Europeans? The very opposite was likely to be, and was in fact afterwards alleged to be their temptation. The great complaint made against them both by the Council and by all the officials in India was that by entertaining actions against such officials for the discharge of their official duties they prevented the collection of the revenue and paralysed the administration of justice. The Europeans of Calcutta earnestly pressed that trials before the Supreme Court in civil cases might be by jury. They could have no reason for that request except that the judges were unduly favourable to complaints by natives.

The conduct of Hastings and Impey appears to me to negative the suggestion that they did, in fact, conspire against Nuncomar as emphatically as the matters just mentioned negative the probability that they would do so. Hastings's conduct throughout, as I have already shown, was not that of a conspirator. His prosecution of Nuncomar for conspiracy would, if he was actually conspiring himself to accuse Nuncomar of forgery, have been an act of the grossest folly. He would expose himself by it to cross-examination and detection. He would embarrass himself by having to carry on two prosecutions at once. He risked (and if he was a conspirator he actually incurred) the disadvantage of having his witnesses discredited, for Commaul O Dien was considerably discredited and probably disbelieved in one of the cases for conspiracy. In a word, the prosecution for conspiracy seems to me to make it improbable that Hastings was a party to the prosecution for forgery.

One small matter, which has, however, some significance, may be mentioned here. Sir Gilbert Elliot argued that the resolution to prosecute Nuncomar for forgery could not have been taken till after Nuncomar's accusation of Hastings, because Driver the attorney did not retain Farrer as counsel for the prosecution. Probably Driver did not absolutely determine on the prosecution till he had got the forged bond in his possession which was towards the end of April, and to save the fee did not retain Farrer till after Nuncomar had secured him. But the inference from Farrer's not being retained seems to me to be favourable to Hastings. If Hastings had been the real mover in the prosecution for forgery, and if Impey had been advising him, Sir Elijah would assuredly have said, "you must retain Farrer." In the nature of things prosecutors and plaintiffs have the first choice of counsel, and the fact that Nuncomar retained the only competent advocate then in Calcutta proves that his prosecutor did not know how to take advantage of his position, knowledge which Impey's experience must have given him. Assume Impey's injustice, and he would have desired nothing so much as that the only competent advocate available should prosecute Nuncomar. This would practically have saved him from the necessity of taking any steps in the matter at all, and would have enabled him to try the case almost silently.

That Hastings denied on his oath and in emphatic terms all connection with the prosecution proves little. A man capable of committing such a crime would be capable of denying it on oath falsely. The facts that his statement was not impeached by cross-examination, and that he voluntarily exposed himself to cross-examination

prove much. They go far to convince me that he knew he had nothing to conceal. His evidence calls forth a curious remark from Mr. Beveridge. Being asked, "Did you ever directly or indirectly countenance or forward the prosecution against Maharajah Nuncomar?" he said, "I never did. I have been on my guard. I have carefully avoided every circumstance which might appear to be an interference in that prosecution." Mr. Beveridge seems to treat this as a statement consistent with the theory that he suborned Mohun Persaud. Not noticing the words "I never did," Mr. Beveridge says "no doubt he was on his guard, and so I suppose was Count Coningsmark when he employed bravoës to assassinate Mr. Thynne in Pall Mall. Coningsmark got off in consequence of his precautions, and so too did Hastings, but most sane people I fancy do not think the better of him on that account." Very few sane people think anything at all about either Hastings or Coningsmark. Few have studied either case sufficiently to be entitled to have any sort of opinion upon it,<sup>1</sup> but I think I could show that Coningsmark's escape was not altogether or even chiefly due to precautions taken by him; but be that as it may, there is this broad difference between the two cases. Mr. Thynne was unquestionably assassinated, and that by three persons closely connected with Coningsmark, whom he had brought into England just at the moment of the crime on different pretexts, and with whom he was in close communication at the time of the assassination. No one ever doubted that Thynne was murdered by Coningsmark's friends. The only question

<sup>1</sup> See my *History of the Criminal Law*, vol. i. pp. 407-8. He was saved by the protection of the judge (Pemberton) and the favour of Charles II. See his case, 9 St. Tr. 1., and in the memoirs of Reresby.

was whether they acted by his orders. But the very question at issue is whether Nuncomar was judicially murdered or executed in the ordinary course of justice. If in truth Hastings never did in any way countenance the prosecution, he at all events was not guilty of a judicial murder, and his innocence if established goes far to prove that no murder at all took place. The fact that he was on his guard against the appearance of taking part in the matter is only what might be expected if he really did take no part. A dies. The question is whether he died of arsenical poisoning or of disease of the bowels. The suggestion is that his doctor administered arsenic in the interest of B the heir. B is asked if he ever procured the doctor to poison A. He says, "I never did. I was on my guard. I avoided everything which could suggest such a thing." Would it be fair to remark, "Your answer admits your guilt. An innocent man would have taken no precautions." The utmost that the answer would really admit, would be that the witness knew he might be suspected. No doubt Hastings knew well that people would think what Mr. Beveridge says.

The conduct of Impey tends to prove his innocence far more strongly than even that of Hastings, and is indeed, to my mind, a conclusive proof that there was no conspiracy at all. I have already given at great length and in minute detail an account of the trial, and have stated my reasons for thinking that it was not only absolutely fair, but even lenient and indulgent towards Nuncomar. If this conclusion is right, it seems to follow either that there was no conspiracy or that if there was one, Impey did not carry out his part in it—a purely gratuitous supposition. This argument appears to me too plain, strong, and concise to be capable of being

strengthened by further observation or illustration. I may, however, observe that the fairness of the trial appears not from one or two isolated points, but from a long series of matters which display themselves in their true light only upon a patient study of the whole proceeding, which so far as I am aware was never undertaken by any competent person till the publication of this work.

For all these reasons I am of opinion that there is absolutely no evidence that either Impey individually, or the judges of the Supreme Court collectively, did conspire with Hastings to murder Nuncomar under the forms of law, and that there is strong evidence to show that no such conspiracy ever existed, and that Hastings was in no way concerned in the prosecution.

The last charge against Impey was that he wickedly refused to respite Nuncomar, and upon this I think more stress has been laid than on the other parts of his conduct. Macaulay states this view of the case with his usual vigour in the following words:—

“That Impey ought to have respited Nuncomar we hold to be perfectly clear. Whether the whole proceeding was not illegal is a question. But it is certain that whatever may have been, according to technical rules of construction, the effect of the statute under which the trial took place, it was most unjust to hang a Hindoo for forgery. The law which made forgery capital in England was passed without the smallest reference to the state of society in India. It was unknown to the natives of India. It had never been put in execution amongst them, certainly not for want of delinquents. It was in the highest degree shocking to all their notions. They were not accustomed to the distinction which many circumstances peculiar to our

“own state of society have led us to make between  
“forgery and other kinds of cheating. The counter-  
“feiting of a seal was in their estimation a common act  
“of swindling; nor had it ever crossed their minds that  
“it was to be punished as severely as gang-robbery or  
“assassination. A just judge would beyond all doubt  
“have reserved the case for the consideration of the  
“sovereign, but <sup>1</sup>Impey would not hear of mercy or  
“delay.”

This passage is followed by the description already quoted of Nuncomar's execution, and that by Lord Macaulay's final judgment on Impey.

“Of Impey's conduct it is impossible to speak too  
“severely. We have already said that in our opinion he  
“acted unjustly in <sup>2</sup>refusing to respite Nuncomar. No  
“rational man can doubt but he took this course in order  
“to gratify the Governor-General” (here follows a refer-  
ence to a letter of Hastings's already observed upon).  
“It is therefore our deliberate opinion that Impey, sitting  
“as a judge, put a man unjustly to death in order to  
“serve a political purpose.”

This vigorous language sums up, with great vigour and point, the substance of a great part of Sir Gilbert Elliot's speech against Impey, and of that part of the article of impeachment against him which relates to this matter. The topic cannot be disposed of in a few words. It is

<sup>1</sup> The gross unfairness of this last observation will appear from what is said further on.

<sup>2</sup> The earlier passage suggests that “a just judge would have reserved  
“the case for the consideration of his sovereign,” apparently of his own  
motion, but here it is charged that Impey “refused” (not merely ne-  
glected) to respite Nuncomar. A refusal implies a request. Lord  
Macaulay would have been puzzled to answer the question Who asked for  
a respite? I believe that no one did so, and it makes a great difference.

by very much the most plausible part of the charge against Impey.

In considering this matter, the first point to be borne in mind, is that for the course taken, the whole of the court was responsible, and that there is absolutely nothing to show that Impey took any part in the matter which was not taken equally by Chambers, Lemaistre and Hyde. Impey positively affirms that this was so in his letter to Governor Johnstone, already quoted, and in this he is corroborated by <sup>1</sup> a letter addressed by all the Judges to the Court of Directors, August 2, 1775, which says, "Our judgments have in every instance been unanimous whatever representations may be made to the contrary. Impey had no power and no interest apart from the other members of the Court, and to single him out as if he was individually responsible for Nuncomar's execution is grossly unjust.

If any one is to be censured at all Chambers is much more open to censure on this head than his brethren, for he appears not to have been altogether satisfied that the conviction upon the statute of 2 George II. was right. He ought then to have been more disposed than his brethren to a respite, but he does not appear to have suggested one.

Macaulay says that he "holds it to be perfectly clear that Impey ought to have respited Nuncomar." I hold it to be perfectly clear that Impey had no power to respite Nuncomar. Macaulay says that Impey would not hear of mercy or delay. I say that there is no evidence whatever that Impey would not hear mercy. As to delay, the execution took place on the 5th of August, sentence having been passed on the 24th June,

<sup>1</sup> Touchet's petition, Gen. App. 3, 19, and see *Parl. Hist.* xxvi. 1383.

an interval of six weeks. No doubt if Impey had used all his influence over the other judges he might have succeeded in inducing them to respite Nuncomar, indeed if he had prevailed on any one of them, his casting vote would have been decisive; but it is one thing to say that he was one of a body of four judges who unanimously decided not to grant a respite, and quite another to say that he ought to have respited Nuncomar, as if he personally had had to decide the question; that he would not hear of mercy, as if he personally had roughly repulsed solicitations for mercy; and that he would not hear of delay, as if he had personally pressed on the execution with indecent haste.

Passing from this, what is to be said of the conduct of the court in omitting to respite Nuncomar? What were their powers, and what was their duty as to the exercise of those powers? Their powers were conferred by a clause in the Charter in these words, "And whereas "cases may arise in which it may be proper to remit the "general severity of the law, we do hereby authorise and "empower the said Court to reprieve and suspend the "execution of any capital sentence, wherein there shall "appear in their judgment a proper occasion for mercy, "until our pleasure shall be known, and they shall in "such case transmit to us a state of the case, and of the "evidence, and of their reasons for recommending the "criminal to our mercy." These words obviously confer a discretionary power. They do not impose any definite positive obligation, and there is this distinction between the two things. Definite positive obligations must be discharged at all events. All that can be expected of the person in whom a discretionary power is vested, is to exercise it in good faith and to the best of his judgment



The judges of the Supreme Court were under a definite obligation to try Nuncomar fairly according to the law of England, but when he was convicted, their only obligation as to a respite was to act in good faith and to the best of their judgment. Did they so act or not? In the letter which he wrote to Governor Johnstone, Impey stated the motives which as he says were predominant in his own mind. Shortly they were, that the crime was aggravated by perjury and forgery, and that the executive government had by their conduct made it impossible for the court to respite Nuncomar without incurring the loss of their own independence and the suspicion of having been either bribed or intimidated. Indeed he says attempts were made both to bribe and to intimidate himself and his colleagues.

Two questions arise upon this letter. Does it state Impey's motives truly? If it does, are they sufficient to justify the course he took? I think they are stated truly though not quite completely, for Impey states others in his defence before the House of Commons. The motives alleged are sufficient to explain Impey's conduct. It is difficult to believe that a man who had not felt them would have alleged their existence, and they are motives which would affect equally all the members of the Court. There can be no ground for putting Impey in a different category from his colleagues, and we must either say that all four had motives for what they did, other than a wish to screen Hastings, or else that all four corruptly determined to withhold a reprieve in order to screen Hastings. To say that three were actuated by other motives and one by a desire to screen Hastings is to make an assumption as gratuitous as it is unjust. It seems to me highly improbable that Impey's real motive for his conduct was to screen Hastings, and that the motives which

he avowed to Johnstone were mere pretexts which may have actuated his three colleagues, but were not felt by himself. He would not refuse a reprieve merely to screen Hastings without a strong motive, but where was Impey's motive? None can be suggested. Assume, however, that there was such a motive. Still the execution of Nuncomar was not necessary. Hastings would have been screened quite as effectually and without any risk at all by a different course. If the Court had respited Nuncomar and had recommended that he should be pardoned on condition of being imprisoned for five years, and paying a fine of <sup>1</sup> a lakh of rupees, Hastings would have been protected as effectually as by his death. Nuncomar's credit would have been utterly destroyed, and there is every reason to suppose that, as it was, he had told all he knew, if indeed he had not told a great deal more than he knew. In the six weeks, which for some unexplained reason passed before his execution he saw whom he pleased, and could make whatever communications about Hastings' misdeeds he thought proper.

Besides Hastings was at the time in a most precarious position. <sup>2</sup> In the following spring Lord North used every effort to get him recalled, and the Court of Proprietors refused to recall him only by a very small majority. A judicial murder in favour of a man so situated could not screen Hastings, but might if Hastings was recalled ruin Impey. To suppose that out of mere friendship Impey tried to serve a falling man by treacherously murdering his enemy is to ascribe to him on the one hand romantic generosity, and on the other the meanest and most cowardly cruelty.

<sup>1</sup> He had got Rs. 69,000 by the forgery.

<sup>2</sup> For the details see Gleig ii. 58, especially McLeane's letter to Hastings, 25th June, 1776.

For these reasons it appears to me that Impey ought to be fully acquitted of any special responsibility for not reprieving Nuncomar, and especially of having withheld the reprieve out of a desire to screen Hastings. No doubt, however, he was as responsible as his colleagues for Nuncomar's execution, and it still remains to be considered whether these motives were sufficient to justify the course taken.

The question hardly admits of a definite categorical answer, because no definite rule exists by which it can be determined. Where I would ask is such a rule to be found? Upon what authority does it rest? Down to the accession of the Queen the question whether sentences of death passed at the Old Bailey should be carried out or commuted, used to be decided at sittings of the Privy Council, at which the King was always present, to discuss what was called the Recorder's report. The judges on circuit had for many years power by statute to reprieve prisoners sentenced to death or to leave them (as it was called) for execution. There were no rules for the exercise of their discretion. There could be none, but if the question is regarded as a question of discretion, I say that the motives which Impey states in his letter to Johnstone deserved to be attentively considered, and might have honestly convinced rational men that Nuncomar ought not to be respited. I am convinced that in former times, when the temptation was to undue severity, and in our own times when the temptation is to sentimental lenity, it would be found, if the facts were known, that reprieves have often been refused or granted on grounds far less weighty and avowable than those by which Impey says he and his brethren were actuated in Nuncomar's case.

I think that any one who reads that letter with candour will find it hard to deny the writer's conclusion. "All I wish (which I hope I need not much labour) to persuade you is that I thought the measure necessary, and that I acted on principles which appeared to be just and urgent."

To me the judges appear to have exercised their discretionary power reasonably and in good faith, and nothing more could be required of them. The question was one in which there was no absolute right or wrong. I cannot better express my reasons for this opinion than by correcting some of Macaulay's statements on this matter, and adding some observations which he overlooks. "The law which made forgery capital in England was passed without the smallest reference to the state of society in India." True, but it was passed with direct reference to a state of society exactly similar to that which existed in 1775 in Calcutta, and it was extended to inhabitants of Calcutta only, and not as Macaulay seems to assume to all India. The 2 Geo. II. c. 25, recites that "Forgery" has of late been practised "to the subversion of truth and justice, and prejudice of trade and credit." But Calcutta had since the establishment of the English power there become a place of "trade and credit" to a great degree, and this was so clearly proved by the evidence of <sup>1</sup> "all the principal native inhabitants of Calcutta who were examined during the course of the trial, and who were certainly persons as well qualified to speak to them as any in Calcutta," that Farrer felt "extraordinarily hurt at it," and <sup>2</sup> said that he "felt himself beat even

<sup>1</sup> Evidence of Farrer before the Impeachment Committee, p. 7.

<sup>2</sup> P. 17.

“in his own opinion on this ground,” *i.e.*, the ground of the inapplicability of the 2 Geo. II. to Calcutta.

“It was, unknown to the natives of India.” True, as to India in general, but it was not unknown to the inhabitants of Calcutta.

“It had never been put in execution among them.” True, even interpreting “them” to mean inhabitants of Calcutta. But one of them, Radachurn Mettre, had been convicted, sentenced, and pardoned under it. It would have been candid in Macaulay to mention this. The turn of his phrase shows that he knew it.

“It was in the highest degree shocking to all their notions.” This probably means that the application of such a law to a Brahmin was shocking to them, but to recognise the special privileges accorded by the Hindoos to Brahmins would have been “in the highest degree “shocking” to all English notions, and in such a case the notions of the ruler must prevail if he is to continue to rule. Macaulay would not have tolerated suttee. It was indeed first made penal all over India by Lord William Bentinck, under whom Macaulay not long afterwards held the office of Legal Member of Council.

“They were not acquainted with the distinction which “circumstances peculiar to our own state of society have “led us to make between forgery and other kinds of “cheating.” The inhabitants of Calcutta were distinctly proved to be well acquainted with them; Parliament on two occasions, namely in 1813 and afterwards in 1827, made forgery in the Presidency towns punishable with transportation for life. Macaulay himself, legislating for the whole of India, makes this very distinction. By article 444 of his draft penal code the maximum punishment for forging a valuable security is fourteen years’

imprisonment with a minimum of two years. By article 394 the maximum punishment for common cheating is one year's imprisonment. If Parliament thought it necessary to punish forgery at the great commercial towns with the severest secondary punishment, if Macaulay himself thought it right to extend a similar rule to all India, how can it be said that the judges of the Supreme Court must have been not only unjust but corrupt when they considered that the English law on the subject was not unsuitable for Calcutta?

"The counterfeiting of a seal was in their estimation "a common act of swindling, nor had it ever crossed their "minds that it was to be punished as severely as gang-robbery or assassination." The speech of the most eager of Impey's enemies, <sup>1</sup> Colonel Fullarton, which is more distinguished for vehement passion than for logic, contradicts part of this. He says that in India, as in old times in England, deeds were authenticated not by signing but by sealing, and that so much importance was attached to the seal that if one person raised money on a deed on which the seal of another had been fraudulently impressed, the owner of the seal had to make good the loss. If this were so the result would be that to counterfeit a seal or to employ a genuine seal fraudulently, would be a specially aggravated sort of cheating.

<sup>1</sup> *Parl. Hist.* xxvi. 474. Colonel Fullarton's logic is oddly illustrated by the following remark: "From these facts the House will judge how "cruel and unjust it was to consider forgery as a capital crime in India, "because it puts it in the power of any one who can lay hold of the seal "of another to expose him to death." The facts to which he refers are stated in the text; so that he seems to have thought that because I can make you civilly liable by fraudulently affixing your seal to a deed, I can also make you criminally liable for my fraud in so affixing it. It is wrong to hang A for misusing B's seal, because if you do, you must also hang B for having had his seal misused.

Be this as it may, Nuncomar's crime lay not so much in counterfeiting the seals of Bollakey Doss and of Commaul O, Dien, as in uttering the forged instrument to which they were affixed, and so robbing his friend's widow of 69,000 rupees, being <sup>1</sup>apparently more than half of the property to which she was entitled.

"The crime for which Nuncomar was about to die "was regarded by them (the Hindoos) in much the "same light in which the selling of an unsound "horse at a sound price is regarded by a Yorkshire "jockey," that is, in the light of a mere breach of warranty. It appears to me wholly incredible that gross frauds resulting in the plunder of a defenceless woman of more than half her property should be regarded in such a light by any one. In point of moral guilt, I do not see that it compares favourably with gang-robbery unattended with actual violence. It inflicts equal loss, and it is much more difficult to detect the offender and to recover the property. Nuncomar's offence was aggravated by subornation of perjury, and by the forgery of at least one document to be used as evidence.

Putting these matters together, consider the position of the judges of the Supreme Court. They believed first that English criminal law had been introduced into Calcutta. In this they were not only unanimous, but were obviously right. All of them with the exception of Chambers also believed that the statute of 2 Geo. II. c. 25 had been introduced into Calcutta. Chambers doubted, not because he differed from his brethren as to the date of the introduction of the English law into India, but because he said he regarded the state of civilisation in

<sup>1</sup> Pudmohun told Mohun Persaud that the balance ultimately payable to the widow would be Rs. 60,000.

Calcutta as like that of England in the interval between Elizabeth and George II., for which reason he would have applied to the case the statute of 5 Elizabeth c. 14. As to this, the Court heard evidence as to the state of Calcutta of such a character as to "beat out of his opinion" even the counsel for the prisoner. Nuncomar's crime was not doubted by any of them, and it was an exceedingly bad one. If a man of wealth and rank were in the present day and in England convicted of forging and uttering a deed, by which he robbed the widow and orphans of his intimate friend of half their fortune, and if he suborned false witnesses, and forged a receipt, in order to defeat justice, penal servitude for fourteen years would be by no means an excessive sentence. Is such a sentence after all, much less severe than sentence of death? I think that an elderly man, occupying an honourable and prominent position in the world, would as a rule, prefer hanging to a term of penal servitude, which would make the rest of his days a period of misery and infamy, and cover him with indelible disgrace, and I also think our modern reluctance to inflict death as compared with our readiness to inflict some secondary punishments a piece of effeminate cowardice. What is the value of a dishonoured old age passed in shameful slavery?

At all events such a crime would be deserving of very heavy punishment. In 1775 the established punishment in England for such offences was death. Many crimes were then nominally capital for which death was seldom actually inflicted, but in cases of forgery it was otherwise. <sup>1</sup> In June, 1777, Dr. Dodd was hanged for forging a bond of Lord Chesterfield's, though before he

<sup>1</sup> See *Annual Register* for 1777, chronicle 187. There is an abstract of his trial at p. 232.



was tried he made restitution of £3,500 out of £4,000, and gave an execution on the goods in his house for the rest of the money, and though every sort of interest was made for a remission of the sentence. In 1777, and long afterwards, the law of England, and especially the criminal law, was the subject of irrational complacency and admiration, not only amongst those who studied it as a profession, but amongst <sup>1</sup>all classes of people. In this state of things I do not see why the judges of the Supreme Court should have been expected to be specially shocked at the notion of Nuncomar's execution for the offence of which he was convicted. On the other hand, the repeated interferences of the Council, and the fear of being supposed to be bribed or intimidated are just the sort of motives by which most men placed in the position in which the judges were placed, would be strongly affected. Judges ready to incur the imputation of corruption and timidity, and to sacrifice the reputation of their Court for independency, rather than permit the execution of a legal sentence merely because it was not in accordance with native ideas, would no doubt show an extraordinary degree of a particular kind of conscientious sensibility, but whether it would have been wise or morbid is another question. Besides it must be remembered that they may have cordially approved of the English law, and have determined to carry it out in a case which fell well within its meaning and where the crime was certainly not attended by any circumstances of mitigation.

<sup>1</sup> The Council of Dacca, in a letter to the Governor-General in Council, dated June 20th, 1776, written to complain of the extension of English criminal law to India, say: "As British-born subjects we revere and "glory in the sublime system of English penal law" (Touchet's petition, Dacca App. No. 5).

Instances may be given in which such considerations have turned the scale against mercy without leaving a stain on the characters of those who held it. <sup>1</sup> When Major André was executed as a spy, Washington wrote to Rochambeau, "Your excellency will have heard of the execution of the British Adjutant-General. The circumstances under which he was taken justified it and policy required a sacrifice, but as he was more unfortunate than criminal, we could not but lament it." His conduct has not usually, I think, been regarded as any thing worse at the most than over severe, and many persons approve of it. Mr. Lecky refuses to condemn it. With regard to the judges of the Supreme Court, I think it may be said that the motives stated by Impey as his own were probably those of all the four, and that whether or not they fully justified their conduct, they were not of a kind to entail disgrace on their memory. I think that the whole difficulty arose from the mistake made originally in not suggesting an indictment at common law rather than on the statute, but the difficulties in the way of such a suggestion must be borne in mind.<sup>2</sup>

The motives avowed by Impey to Johnstone were not the only ones which acted on him. He pointed out others in his defence at the Bar of the House of Commons, on which Elliot in his turn made observations. The Charter required the judges to give their reasons for a

<sup>1</sup> See Lecky, *History of England*, vol. iv., p. 146.

<sup>2</sup> In the note already referred to, with which I have been favoured by Mr. Belchambers, a list is given of cases in which sentence of death was passed by the Supreme Court, from 1796 to 1821, for crimes then capital by the English statute law, though not by any law known to the natives of India. Sentences for burglary and robbery were not uncommon. There are also three for stealing in a dwelling house to the value of forty shillings in 1800, 1802 and 1809, which do not appear to have been commuted. Surely these are stronger cases than Nuncomar's?

recommendation to mercy. Impey asked what reason they could have given? Elliot suggested four, most of which had been anticipated by Impey in his defence. Hence the controversy between them may be exhibited almost in their own words in the form of an altercation as follows.<sup>1</sup>

1. *Elliot*. You should have respited Nuncomar because of the legal doubts in the case.

*Impey*. We did not think there were any doubts.

*Elliot*. Chambers thought the indictment illegal.

*Impey*. Chambers waived his objection and must have joined in rejecting the appeal, if any appeal was in fact presented. <sup>2</sup>Chambers indeed proposed on the day of Nuncomar's execution to have his property seized by way of forfeiture, which I refused to do. Chambers also, on the 2nd August, 1775, signed <sup>3</sup>a letter addressed by all the judges to the Court of Directors, which said,

<sup>1</sup> See for Impey's speech *Parl. Hist.* xxvi. 1387, 1388, and for Elliot's vol. xxvii. 432-436. This occurs in the ill-reported part of the speech, and is not in the part of the printed speech which still exists.

<sup>2</sup> Impey read in the House a letter from Chambers to himself on this subject which certainly shows no tenderness or misgiving about Nuncomar. "Dear Sir—As I understand that Nuncomar has been executed this morning, I submit it to your consideration whether the sheriff should not be immediately ordered to seal up this day (if he has not done it already) not only the books and papers of the malefactor, but also his house and goods. Among his papers, if not secreted, it is said there will be found bonds from many persons, both black and white against whom I conceive that writs of *scire facias* should be directed by us as supreme coroners. I am also inclined to think that a commission should issue under the seal of the Supreme Court to persons appointed by us to inquire after his effects at Moorshedabad and elsewhere, but this I have not sufficiently considered, and only mention it now that you may think of it. . . . However, the first step to be taken by the sheriff ought not I think to be delayed a minute." If Chambers really thought that Nuncomar had been illegally put to death, he showed, at all events, great eagerness to secure for the Crown the full advantages of the crime. He agreed with the rest of the Court in not advising a respite.

<sup>3</sup> Touchet's petition, Gen. App. 3, 19, and see *Parl. Hist.* xxvi. 1383.

“Our judgments have in every instance been unanimous, whatever representations may be made to the contrary.”

*Elliot.* Chambers did not waive his objection. “Being a man of a mild and flexible character, although of great knowledge and integrity, he did not renew his objection.” As to the letter, “it reflected no disgrace on the character of Sir Robert Chambers, who had been induced to sign a letter containing a paragraph of which he could not approve; but on the stubborn and inflexible character of the writer who inserted the paragraph.”

The only reason for thinking that Chambers did not waive his objection, or did not mean what he said in the letter which he signed, is that his doing so was inconsistent with Elliot’s theory.

On this point Impey appears to me to have had far the best of the argument.

2. *Elliot.* You should have respited Nuncomar, because it is unjust to enforce in one country the laws of another.

Impey does not specifically deal with this point, but the answer to it is obvious. It begs the question. Impey’s case was that this part of the English law was the law of Calcutta, and that the injustice of introducing it, if it was unjust, was the injustice, not of the judge, but of the legislature. Impey could not be expected to act otherwise than according to the provisions of the Act and Charter under which he was appointed.

3. *Elliot.* You should have granted a respite because Nuncomar was a Brahmin, “a rank considered as sacred in India, where the natives think it impious to take the life of a Brahmin.” The execution of Nuncomar

must have made the poor of India shudder, as they must have thought if neither wealth nor rank could save a man's life what would become of the poor and the mean? . . . . "It was not for Elijah Impey, it "was not for a handful of strangers, to decide that this "was an absurd distinction. What appeared absurd "according to our ideas of society might, for anything we "knew, be perfectly proper and well founded according "to theirs, and we were not, with a vain presumption, to "trample on established laws with the reasons of which "we were not acquainted.

*Impey.* "Should his rank and opulence have been "stated? It was proper those facts should be left to the "jury for them to draw inferences against the probability "of his having committed the crime; but when the case "had been clearly proved to their satisfaction they re- "mained aggravations, not mitigations; they were left to "the jury, and the inference in favour of the prisoner "was pointed out to them."

I have quoted these arguments in the very words of those who used them because they are highly characteristic. Sir Gilbert Elliot's view is based on the principle that the English had no business to be in Calcutta at all, and that the introduction of English law even within the Mahratta ditch was in itself so tyrannical that any harsh consequences which might follow ought to be visited on a judge who ventured to act even impartially upon such a system. The English, he considered, were morally bound to respect Indian institutions to the extent of regarding a Brahmin as inviolable. Hardly any one in the present

<sup>1</sup> Near the end of the summing up the following remark occurs :  
"There is certainly great improbability that a man of Maharajah Nun-  
comar's rank and fortune should be guilty of so mean an offence for so  
"small a sum of money" (20 *St. Tr.* 1076).

day will doubt that Impey had the best of this argument. If English law were to be enforced and English judges were to sit in Calcutta at all they could be no respecters of persons.

4. "*Elliot*. You should have respited Nuncomar "because of 'doubts as to facts, and the circumstances " 'attending the cause.' "

(a) "The doubts as to facts arose upon the evidence "at the trial."

Impey does not deal with this, but his whole argument implies that the facts were proved, and I, for reasons already given, agree with him.

(b) "The circumstances were the prisoners having "preferred an accusation against the Governor-General, "the reasons that the natives had on that account to "suspect that the Court would be prejudiced, the parties "that prevailed in the settlement by which men's minds "were in such a fermentation, agitated by such heat and "passion as rendered it impossible for them to judge "impartially, and the common interest of almost all the "British inhabitants in deterring the natives from. "becoming accusers."

Impey had dealt with the important part of this as follows :—

"Should it have been stated as a reason to his Majesty "that Nuncomar had preferred an accusation against Mr. "Hastings? Who was the accuser, and who was the "accused? It was notorious to all India that Nuncomar "had been the public accuser of Mahommed Reza Khan "without effect, though supported by the power and "influence of the Government. He had been convicted "before the judges of a conspiracy to bring false accusa-

<sup>1</sup> *Parl. Hist.* xxvi. 1389.

“tions against another member of the Council. Against  
“whom was the accusation? Not against Mr. Hastings,  
“censured by this House; not against Mr. Hastings,  
“impeached before the House of Lords; not the Mr.  
“Hastings for whom the scaffold is erected in West-  
“minster Hall; but that Mr. Hastings whom I had heard  
“the Prime Minister of England, in full Parliament,  
“declare to consist of the only flesh and blood that had  
“resisted temptation in the infectious climate of India;  
“that Mr. Hastings whom the King and Parliament of  
“England had selected for his exemplary integrity, and  
“intrusted with the most important interests of this  
“realm. Whatever ought to be my opinion of Mr.  
“Hastings now, I claim to be judged by the opinion I  
“ought to have had of him then. What evidence had  
“the judges that the accusation of Nuncomar was true?  
“How could they know that they were screening a public  
“offender in the person of Mr. Hastings, so lately ap-  
“plauded, so lately rewarded by the whole nation?  
“Ought the judges to have taken so decided an opinion  
“on the guilt of Mr. Hastings as to grant a pardon to a  
“felon, and assign as a reason that the convict had been  
“his accuser? With what justice to Mr. Hastings could  
“this have been done—with what justice to the com-  
“munity? Who could have been safe, if mere accusation  
“merited indemnity?” The warmth with which Impey  
speaks of the character of Hastings shows Impey’s own  
sincerity, courage and friendship. His language was  
capable of being used to show that he was a partisan of  
Hastings, and it certainly does show that he had a high  
opinion of him.

It is remarkable that Elliot should have passed over  
wholly unnoticed, these trenchant and vigorous words

which strike directly at the root of the most popular and important of Elliot's topics. The argument notwithstanding the warmth of feeling which it shows about Hastings appears to me as powerful as the language in which it is conveyed is vigorous. But in order to appreciate its weight fully, reference must be made to the facts related in Chapters VII. and X., as to the efforts made to save Nuncomar, and as to the course taken by Clavering and Francis with regard to the petition which was burnt by the jailer of Calcutta as a libel by the order of the Council.

I need not repeat the facts already stated, nor will I here anticipate the contents of the next chapter. I content myself with quoting the argument which was drawn by Impey from the silence of the Council. An argument, I may observe, which after Impey's defence was made was further strengthened by the evidence given by Farrer, as to his consultation with Clavering, Monson, and Francis, at the party given by Lady Ann Monson

"In the next charge I am severely censured for  
"observations made in the course of commenting on  
"evidence to the prejudice of the defendant's cause, and  
"to the gentlemen of the Patna Council in a cause  
"regularly before me. How much more should I have  
"been subject to censure, had Mr. Hastings been at this  
"time, in the opinion of this House, the man that he was  
"then understood to be in India, by this House, and by the  
"nation at large, if I had gone out of the cause and  
"wantonly defamed and prejudged him without any  
"evidence to give colour to the outrage? But though it  
"would have been unjust in me or the judges, either to  
"have suggested these reasons as coming from the Court,  
"or to have adopted them without positive proofs on the



“suggestion of others; yet if that part of the Council  
“who were convinced of the guilt of Mr. Hastings had  
“made a representation to the judges, that there were  
“probable grounds for the accusation, and shown those  
“grounds; if they had stated (as well they might, if the  
“notoriety was as the charge represents) that there was  
“just reason to believe ‘that the prosecution was at the  
“‘instigation of Mr. Hastings or his partisans, with a  
“‘view to screen him, and not for the sake of procuring  
“‘justice against the convict;’ there can be no doubt  
“but the judges would have respited the criminal, even  
“though there might not have been evidence sufficient  
“to convince them. They would have transmitted to  
“his Majesty the representations of the Council as the  
“cause for the respite, and left it to him to judge of the  
“validity of their reasons. If the judges had not yielded  
“to that representation, they would indeed have in-  
“curred great responsibility; if the gentlemen of the  
“Council so thought, it would have been justice to the  
“criminal, it would have been justice to the Court, and a  
“duty they owed to the public, to have made that appli-  
“cation. But what their real opinion was, will appear  
“hereafter by their public and solemn acts. Consistent  
“with that opinion they could not have made such a  
“representation.”

A full explanation of this will be found in the next chapter.

I have now gone through in the most minute detail every part of the story of Nuncomar, with the exception of a single detached incident in the case, which for the sake of its curiosity I shall describe in the next chapter, but it does not directly bear on the conclusions at which I have arrived, which I may now in a very few words sum up.

I think that the <sup>1</sup>specific accusations made by Nuncomar against Hastings originally, were and always remained unsupported and dependent entirely on Nuncomar's statements which, so far as they were inquired into were contradicted by the persons to whom he referred. I think, however, that Hastings's conduct, when accused, was not such as in itself to prove his innocence, and was such as to give his enemies a handle for asserting his consciousness of guilt. But on the other hand I think that the rashness and violence of the conduct of his enemies was enough to make even an innocent man stand on his legal rights, and refuse to say or do anything which he was not legally compelled to say or do.

I also think that it is not true that Nuncomar's accusation put Hastings in such a position that he had to choose between disgrace and ruin on the one hand, and a judicial murder on the other.

I think that Mohun Persaud was the real substantial prosecutor of Nuncomar, and that Hastings had nothing to do with the prosecution, and that there was no sort of conspiracy or understanding between Hastings and Impey in relation to Nuncomar, or in relation to his trial or execution.

I think that Nuncomar's trial was perfectly fair, and that Impey's conduct in it was not merely just but even favourable and indulgent to Nuncomar.

With regard to its legality I doubt whether the statute 2 George II. c. 25 was part of that part of the criminal law of England which was introduced into Calcutta. A rule was long afterwards laid down according to which it was not, but I am by no means sure that this

<sup>1</sup> I refer to Nuncomar's statements as to the money which he said he paid himself. The more general accusations I do not notice here.

rule was well founded. I think that Impey and the other judges were in good faith of opinion that the statute was in force ; though Chambers doubted, he did not then insist on his doubt, which, however, he acted upon eleven years later. I think, however, that an indictment for the common law offence would on all accounts have been better than an indictment on the statute. The Court was not, however, responsible for the form of the indictment. It might certainly have recommended an indictment at common law, but it was not clear that such an indictment would have been good.

I think that in omitting to respite Nuncomar the judges exercised their discretion in good faith and on reasonable grounds, which was all that could be required of them. Others might with equal good faith have taken a different view of their duty. When they had once allowed a prosecution on the statute, they were no doubt placed in a great difficulty. On the one hand they might permit Nuncomar to be executed for an offence not generally recognised as capital in Calcutta at the time when it was committed, a course which, apart from any question as to over-severity, was sure to be and was in fact misunderstood. On the other hand they might respite him for a crime punished at that time in England with death, with inflexible severity, the crime being a very bad one in itself, aggravated by perjury and forgery, and the act of granting a respite being sure to be represented and understood as being either weak or corrupt, or both.

Macaulay's final judgment on Impey is, "It is therefore our deliberate opinion that Impey, sitting as a judge, put a man unjustly to death to serve a political purpose." It is, for the reasons given, my deliberate opinion that not one word of this is true. Impey did not

put Nuncomar to death at all. He was one of four persons who refused to respite him, which is a different thing. At the time of such refusal the judges were not sitting as judges; they were sitting in an executive capacity and exercising an executive and not a judicial discretion; and it is therefore incorrect to say that Impey was "sitting as a judge." I think that this proceeding was not unjust, though I do not affirm that it was not mistaken. Lastly, I do not believe that Impey, or any of his colleagues, acted as they did in order to serve a political purpose.

The debate upon the motion to impeach Impey had, as is the case with all such debates, a pictorial as well as a judicial side. It has been described at great length by Sir N. Wraxall, and is also mentioned, though by no means so fully, in Sir Gilbert Elliot's memoirs, a book which appears to me to give him one of the very first places amongst the men of his time.

Wraxall's account of the matter gives me, as indeed do the rest of his writings, a low opinion of him. He does not appear to me to have followed or understood the various arguments employed. I do not suppose he had bestowed any real study on the subject. He says of Elliot's speech, "his monotonous and measured enunciation, unilluminated by a ray of vivacity or a spark of wit" (what had wit to do on such a matter?) "derived nevertheless an interest from the sound sense which pervaded his whole discourse, from the serious nature of the accusation preferred, and above all from his accurate information on the subject." <sup>1</sup> After Elliot had finished the first part

<sup>1</sup> The printed speech as far as it goes is certainly better suited for a Court of Law than for the House of Commons. It goes into the different points both of law and fact with which it deals with extreme minuteness

of his speech, he asked for an adjournment, which was objected to by Impey's friends, and reference was made to Impey's feelings. Burke upon this burst out, "The person himself does not manifest in his deportment that he is much actuated by feelings becoming his present situation. I have recently seen him in Westminster Hall, where he appeared rather like an accuser than a party accused. Contumacious, arrogant, confident and assuming—" Here he was called to order. Burke had certainly given a good sketch of an accuser. Nothing can be more characteristic of Burke in his later years than his "contumacious, arrogant, confident, and assuming" behaviour and his furious anger at any man who offered anything like a manly opposition to the invectives of his party and himself.

Wraxall highly disapproved of Impey, but "left London in order to avoid giving any vote," because "as three other judges participated with him throughout the whole proceeding" he doubted whether Impey could "legally be an object of exclusive impeachment." As Wraxall supported Hastings warmly, this shows strongly that his view of the matter was very different from mine. He does not however appear to me to have studied it, nor does his account of the debate amount to anything more than a selection of what he regarded as the most interesting things said on the occasion. Fox, he says, argued thus, "It is to my conviction absurd to maintain that no malice existed in the Chief Justice's

and at almost interminable length; it contains, amongst other things, a long statement of, and commentary upon, *Campbell v. Hall*. It relates at full length the whole of the Company's title to Calcutta. It analyses word by word certain parts of the Regulating Act, and it discusses parts of Farrer's evidence before the Impeachment Committee, with a minuteness which is not only tiresome but almost superstitious.

"mind throughout the trial. *His subservience to Hastings is to be presumed from all the circumstances of the case.*" "Being so presumed, a corrupt motive forms a necessary inference, for no two individuals would agree in so wicked an act as that of taking away a fellow creature's life without a corrupt motive." This presents a strange confusion of ideas. If there was a conspiracy between Hastings and Impey, the motive is unimportant. If there was no motive, there probably was no conspiracy. To regard the motive as the important matter, and to infer its existence from a conspiracy arbitrarily presumed is doubly preposterous. ✓ Not only is the cart put before the horse, but the existence of an invisible cart is assumed in order to prove the existence of an equally invisible horse. Pitt, I think with perfect propriety, "treated the accusation of a conspiracy between Impey and Hastings for the purpose of destroying Nuncomar, as destitute of any shadow of proof."

Sir Gilbert Elliot's delightful letters to his wife, probably the pleasantest and most characteristic of all the memorials of that age, contain various allusions to the impeachment of Impey. In order to appreciate the following extract it is necessary in the first place to quote his <sup>1</sup>peroration. "Sir Gilbert having spoken of the ghost of Nuncomar visiting Sir Elijah and demanding justice, concluded thus, 'The blood of the murdered Rajah is on all our heads! The cry, the clamour of blood is still ringing in our ears, and bursting our walls for vengeance! To your justice therefore I commit the culprit. Deal with him as he deserves.'" "Wraxall says, "there is something in these appalling expressions which involuntarily reminds us of Clarence's dream.

<sup>1</sup> *Publ. Hist.* xxvii. 442.

<sup>2</sup> *Memoirs*, v. 107.

“‘Seize on him, furies, take him to your torments.’” To me, like most eloquence, it resembles nothing so much as mouldy wedding-cake. To the hearers, however, it was affecting. This is Sir Gilbert’s own report to his wife :

“<sup>1</sup> You may at last wish me joy of having completely “finished this labour. I concluded my opening yesterday. “We were beat yesterday, but our defeat is very like a “victory.” (The main difference was that it was not one.) “Sir E. Impey had his own personal friends, “the lawyers, in a body—that is to say, fifteen of them “out of twenty who were present, the whole Indian “corps, Lord Lansdowne’s squadron, and the whole force “of the ministry : and with all this he could raise a “majority of only eighteen. The numbers were fifty-five “to seventy-three, and we lost Francis, who could not vote “for a point of delicacy, and also Sir G. Cornwall, who “was in the chair. . . . The debate was still more trium- “phant than the division, and we brought Pitt, and his “lawyers and friends, to the greatest disgrace. Pitt never “exposed himself and his profligacy in so great a degree “before. My share in it has been successful beyond my “most sanguine expectations. I was fortunate enough “to conclude with an affecting passage. I had tears and “violent emotions all round me as before, and my powers “certainly went very far beyond any idea I could have “formed of them myself. Dudley Long was one of the “weepers, Adams another, and indeed the whole House “and gallery were worked up to an extraordinary degree “of feeling and emotion . . . .’The debate began yester- “day at half-past six with me, and I spoke till ten. Then “a little disturbance happened by Sir J. Johnstone’s being

<sup>1</sup> *Life and Letters of Sir G. Elliot*, i. 201. Date, May 10th, 1788.

"drunk, and the debate then proceeded till about seven  
"or half after seven this morning."

Some light is thrown on the reference to Sir J. Johnstone's being drunk, by a passage in <sup>1</sup> Wraxall, who says that Johnstone distinguished himself on the occasion "by the Spartan force and brevity of his speech." After listening to Colonel Fullarton for nearly two hours, he said, "Every argument confirms my opinion that the question ought to be supported. We have beheaded a king, we have hanged a peer, we have shot an admiral, we are now trying a governor-general, and I can see no reason why we should not put on his trial a judge and a chief justice." Sir J. Johnstone must have been very drunk indeed if he thought the House of Commons had anything to do with the execution of Charles I., or of Lord Ferrers, or of Admiral Byng, or that it was trying Hastings, or that if all that he said was true, there was any sort of logical connection between its different parts.

The crying is as characteristic as the rest; the men of those days appear to have had none of the contempt for the display of emotion which happily prevails now. Men hardly ever cry or hug each other in public in these days, but the sentiment which condemns such exhibitions is modern. <sup>2</sup> In his journal of Feb. 8, 1787, Elliot describes how after his speech in the House of Commons on the Begum charge, Sheridan was greeted by "all his friends throwing themselves on his neck in raptures of joy," and how Burke "caught him in his arms as he sat down" after opening the same charge before the House of Lords.

<sup>1</sup> V. 111.

<sup>2</sup> 124, 218.



## CHAPTER X.

### NUNCOMAR'S PETITION.

IN an earlier chapter I have noticed in passing the incident of Nuncomar's petition to the Council, which petition was delivered by Clavering after Nuncomar's execution, and was upon the motion of Francis, burnt as a libel by the jailer for want of a common hangman. This transaction was stated in detail by Impey before the House of Commons in his own defence, as a proof that the Council themselves did not at the time when the execution took place regard it as a judicial murder; an inference which, after the speech was made, was greatly enforced and corroborated by Farrer's relation of the attempt made by him to induce the majority of the Council to adopt and promote the petition which Farrer had prepared on Nuncomar's behalf, and of their refusal to do so. This transaction, and the controversy between Impey and Francis which it occasioned, appear to me to throw great light on the origin and value of the accusations made against Impey, and on the character and conduct of Francis, although they certainly do not affect the questions of Hastings's connection with the prosecution, or of the propriety of

Impey's conduct at and after the trial, or of Nuncomar's guilt or innocence, or of the propriety of executing the sentence passed upon him.

The story is as follows:—On August 14th, nine days after Nuncomar's execution, Clavering informed the Council that on August 4th, the day before the execution, <sup>1</sup>“a person came to my house who called himself a “servant of Nuncomar, who sent in an open paper to “me; as I imagined that the paper might contain some “request that I should take some steps to intercede for “him, and being resolved not to make any application “whatever in his favour, I left the paper on my table “till the 6th, which was the day after his execution, “when I ordered it to be translated by my interpreter.” He added, “As it appears to me that the paper contains “several circumstances which it may be proper for the “Court of Directors and his Majesty's ministers to be “acquainted with, I have brought it with me here, and “desire that the Board will instruct me what I have to “do with it.”

Hastings and Barwell remarked that Clavering seemed to make a great mystery of the paper, and Hastings said he thought it ought to be produced.

It was produced and translated. <sup>2</sup>The material part of it is as follows:—

“For the fault of representing at this time a just fact “which for the interest of the king and the relief of the “people I in a small degree made known, many English “gentlemen have become my enemies, and having no “other means to conceal their own actions, deeming my “destruction of the utmost expediency for themselves,

<sup>1</sup> Bengal Secret Consultations for Aug. 14th, 1775.

<sup>2</sup> See facsimile copy in Impey's *Memoirs*, p. 417.

“revived an old affair of Mohun Persaud’s, which had  
“formerly been repeatedly found to be false; and the  
“Governor, knowing Mohun Persaud to be a notorious  
“liar, turned him out of his house, and themselves be-  
“coming his aiders and abettors, and Lord Impey and  
“the other justices have tried me by the English laws,  
“which are contrary to the customs of this country,  
“in which there was never any such administration of  
“justice before, and taking the evidence of my enemies  
“in proof of my crime, have condemned me to death.  
“But by my death the king’s justice will let the actions  
“of no person remain concealed; and now that the hour  
“of death approaches I shall not for the sake of this world  
“be regardless of the next, but represent the truth to  
“the gentlemen of the Council.

“The forgery of the bond of which I am accused never  
“proceeded from me.<sup>1</sup> . . . . If I am unjustly put to  
“death I will with my family demand justice in the next  
“life. They put me to death out of enmity, and from  
“partiality to the gentlemen who have betrayed their  
“trust; and in this case the thread of life being cut I in  
“my last moment again request that you gentlemen will  
“write my case, particularly to the just King of England.”

This petition was entered in the books of the Council on the 14th August. On the 16th Hastings moved that a copy of it should be sent to the judges as it reflected on their characters, and Barwell agreed with him; but Francis, Monson, and Clavering all opposed this motion. Francis said that to send a copy to the judges would give the paper “much more weight than it deserves,” and

<sup>1</sup> If Nuncomar had been an Englishman these words would look like an admission that the bond was forged, but it is probable that it is only a denial of the charge. There is a grim likeness here to the letter to Francis quoted above.

added, "I consider the insinuations contained in it against them as wholly unsupported and of a libellous nature, and if I am not irregular in this place I should move that orders should be given to the sheriff to cause the original to be burned publicly by the hand of the common hangman." Monson said, "I think this Board cannot communicate the letter to the judges; if they did they might be liable to a prosecution for a libel. The paper I deem to have a libellous tendency, and the assertions contained in it are unsupported." Clavering objected to sending the paper to the judges, because he thought it might make the members of the Board who sent it liable to a prosecution. Francis finished the debate with the following remarkable statement:—"I beg leave to observe that by the same channel through which the Court of Directors and his Majesty's ministers, or the nation, might be informed of the paper in question, they must also be informed of the reception it had met with and the sentence passed upon it by this Board. I therefore hope its being destroyed in the manner proposed will be sufficient to clear the characters of the judges so far as they appear to be attacked in that paper, and to prevent any possibility of the imputations indirectly thrown on the judges from extending beyond this Board. I move that the address of the Rajah Nuncomar entered in our proceedings of Monday last be expunged."

It was accordingly expunged, and the original copy was burnt,<sup>1</sup> not by the common hangman, because there was none, but by the jailer under the direction of the sheriff of Calcutta.

<sup>1</sup> Impey, p. 99, note, and see Tolfrey's evidence, Impeachment Committee, p. 142.

The part taken by Francis on this occasion is all the more remarkable when we remember the letter addressed to him by Nuncomar already referred to.

The petition was, as appears from the secret consultations, entered upon the books of the Council on the 14th August, and the Persian translator sent in a corrected translation on the 18th, when it was ordered to be expunged "and that the translations be destroyed." Hastings, however, kept a copy, which, with corrections in his own handwriting, he gave to Impey. Impey produced it and read it in his defence. He said that Hastings "thought <sup>1</sup> it no more than common justice to the judges "to give it to me, and as it was in the secret department "of the Government he delivered it to me under an oath "of secrecy not to disclose it in India except to the judges. "Except to them it has not been disclosed to this day, "when it is called forth by necessity for my defence."

Impey argued upon this story that it clearly proved that at the time when the events were recent and notorious, Francis described as a libel fit to be burnt by the common hangman the very charge of which he at the time of his impeachment approved, and was presumably the principal instigator. He had, indeed, cunningly procured such an alteration in the entry originally made in the record of the Consultations as would have rendered it unintelligible but for the copy of the petition produced by Impey, and this enabled Francis afterwards (without exposing himself to the retort of contradicting in September what he had said in August) to join in (and probably to compose) the minutes signed by Clavering, Monson, and himself, in September and November, 1775,

<sup>1</sup> Impey's speech before the House of Commons in 1788 (*Parl. Hist.* xxvi. 1406).

which insinuated, without expressly charging, that Nuncomar had been judicially murdered, and called forth Impey's vindication of January, 1776.

Francis took this as an attack upon himself, offered to be called as a witness on the Impeachment Committee, and <sup>1</sup> made a speech in the Committee in his own vindication. It is said by the younger Impey that this speech was afterwards published by Francis as a pamphlet, and disavowed by him, and that Sir Elijah Impey wrote a pamphlet in answer to it. The pamphlets attributed to Francis and Sir Elijah Impey are in the British Museum. The pamphlet attributed to Francis I should think must really be his, because it would be most unlikely that any one else should write it. That Francis disavowed it rests, so far as I know, upon the statement in Impey's answer, but Impey would hardly have made that statement if it had not been true. He would have preferred a direct attack upon Francis to an attack on the imaginary author of the pamphlet. Francis's disavowal would not lead me to doubt that the pamphlet was really his. The pamphlet corresponds closely with the speech as reported in the *Parliamentary History*. No one else could have any motive for republishing what he had said, and Mr. Merivale gives <sup>2</sup> excellent reasons for sup-

<sup>1</sup> Francis's speech is published in the *Parl. Hist.* xxvii. 40-54. The speech was made February 26th, 1788. He made another speech on the same subject April 16th, 1788 (see *Parl. Hist.* xxvii. 265-266). After this Sir Gilbert Elliot "framed a question and answer to show that Mr. Francis had offered to deliver in a written copy of his defence "against the accusation made at the bar by Sir Elijah, and that the "Committee had refused to receive it." He was afterwards questioned by Elliot "as to his opinion of the truth or falsehood of the petition "sent by Nuncomar."

<sup>2</sup> *Life of Francis*, ii. 205-207. The following is a good instance of the sincerity of Francis. A book called *Travels in Europe, Asia, &c.*,

posing that Francis both wrote many anonymous pamphlets after his return from India, and not improbably "carried the Junian habit of denying authorship "into his subsequent literary transactions."

Great part of the two pamphlets consists of the statement of matters of fact already related and commented upon, in the preceding parts of this work, and need not be here repeated, but the following is the substance of the argument.

Francis states the charge which he says was made by Impey against him as consisting of a statement that the majority of the Council, of whom Francis was one, ought not to be believed when they intimated an opinion "that "the prosecution, trial, and execution of Nuncomar were "founded on political motives, and pursued for the sole "purpose of saving Mr. Hastings from the effect of that

said to be by one Macintosh, was published in 1781, and contains a great deal of matter about Indian questions, and strongly takes the part of Francis. It was said that Francis had written parts of the book. He wrote from England: "In answer to a thousand lies you will have heard "about Mr. Macintosh, I declare to you most solemnly that I never did "employ or authorise him, directly or indirectly, to say or do anything "for me, or on my account in England." The letter is dated *January 18th*, 1782. In a cash-book of Francis's Mr. Parkes discovered two entries as follows:—

"1782, February.—Draft of Mackintosh paid £ s. d.

"*January 18* . . . . . 1,078 4 10

" ,, December 6,—Paid Mr. Almon (the

"bookseller) in full for Mackintosh 56 18 6

"The same cash-book," adds Mr. Merivale, "contains large advances to "his cousin Major Baggs, of the same date. Baggs, it will be remembered, left India 'fully instructed' on behalf of Francis, but Francis in "his letters equally denies having made any use of Baggs as an agent." After this, no reliance at all ought to be put on the uncorroborated statements of Francis. He must have been an habitual liar. Mr. Hayward speaks of his "habitual disregard of truth," and gives a remarkable instance of it, "More about Junius," *Hayward's Essays*. New Series, ii. 360-1.

"man's evidence," because a few days after the execution they had ordered Nuncomar's petition, which implied the same thing, to be burnt as a libel, Francis in particular declaring "the intimations contained in it as wholly "unsupported and of a libellous nature."

The charge was certainly stated fairly, but it was not met with equal plainness. Francis made a number of introductory and irrelevant statements before he came to the refutation. He argued at length that Hastings had broken his oath of office in giving Impey a copy of the petition of Nuncomar. He haggled over the authenticity of the paper produced by Impey, which however he did not seriously deny and substantially admitted. He suggested that this act on Hastings's part implied a conspiracy between Hastings and Impey which again made it probable that Hastings had told Impey of the nature of the accusations made by Nuncomar against Hastings. He read out all the minutes in which the story is told. He then said it would throw light on the subject if he read a good many more minutes, written both before and after the execution of Nuncomar, and he accordingly did read several referred to <sup>1</sup> above, which show clearly that the majority of the Council on several occasions made insinuations against the judges which they did not communicate to them or venture to put into the shape of accusations, and at last when the Committee might be supposed to have forgotten what was the charge he had undertaken to meet, he began to enter upon his defence. He divided it into two parts, namely, the charge as it affected the majority in general, and the charge as it affected Clavering in particular. His first argument on the general charge was that it was

<sup>1</sup> Vol. I. p. 251.



improbable that he and his colleagues should grossly contradict themselves by repudiating early in August, that which they had plainly insinuated both in April and in May before Nuncomar's trial, and which they repeated afterwards in September and November.

The answer to this weak remark was obvious. They protected themselves from allowing any contradiction to appear on the face of the Consultations by expunging Nuncomar's petition, and so making it impossible to tell from the Consultations what was the nature of the imputation which he had made upon the judges. The entries made in April and May could not refer to a trial which took place in the second half of June. The insinuations made in September and November were not contradicted by the Consultations as they stood, for it might well be that the petition which they ordered to be burnt contained matter different from that of which their subsequent insinuations suggested the existence.

Francis's argument was thus exactly parallel to the case of a fraudulent accountant who, being charged with making a false entry in the ledger, says, "Why, how can you suppose I should be such a fool as to contradict the day-book?" and who is met by the remark, "You forget that you made an erasure in the day-book so as to prevent it from being in contradiction with the ledger as altered."

Francis's next argument was that there was no inconsistency between burning Nuncomar's petition as a libel and imputing to Impey the very offence with which that petition charged him. In substance his explanation was this. What I said was that "to send the judges a copy of Nuncomar's petition would be giving it much more weight than it deserved; that I considered the insinua-

"tions contained in it against him wholly unsupported  
"and of a libellous nature. I thought and said so then.  
"I think and say so still, in the extent and manner in  
"which they were stated in that paper. The person in  
"whose name it appeared was dead. He had, whether  
"justly or unjustly, legally or illegally, been convicted of  
"a crime, and had suffered an ignominious death. Even  
"if he had been respited after conviction his evidence  
"would have been useless for his credit was gone. A  
"petition from such a person accusing his judges could  
"have no sort of weight. It came before us without a  
"responsible accuser, without a proof or evidence of any  
"kind. I therefore said it was wholly unsupported.  
"No man, I presume, will deny that in strictness it was  
"of a libellous nature.

"I asserted then, as I assert now, that it was a libel on  
"the whole court of justice in the strict and proper sense  
"of the word. The dreadful charge contained in it in-  
"cludes *all* the judges, concerning two of whom (Sir  
"Robert Chambers and Mr. Hyde) we never had a sus-  
"picion of the motives which we attributed to Sir Elijah  
"Impey, though I am far from acquitting them of all  
"blame. Concerning another of the judges, the late Mr.  
"Lemaistre, though we saw him united in the closest  
"intimacy with the Chief Justice, and ready to support  
"his opinions on all occasions, with a degree of zeal and  
"passion which, however sincere, was not to be excused,  
"yet in that which constituted the deadly guilt of the  
"transaction we never suspected him to be concerned, in  
"a confederacy, I mean with Sir Elijah Impey, to take  
"off Nuncomar in order to save Mr. Hastings from the  
"effect of that man's evidence. We were bound therefore  
"to treat that petition as an indiscriminate libel against

"a whole court of justice. Is there anything in that resolution, or in the terms of my opinion on which it was founded, that under any, I will not say fair and liberal, but under the most rigorous construction can be understood to express or signify that we thought the paper *false* as well as libellous of all the judges?" Francis then quoted a minute of his own, dated March 21, 1775, in which he gave an account of what he understood by a libel. In that minute he said, "When the man who advances a specific charge, declares himself ready to come forward and support it, and to hazard the consequences of failing in his proofs, it may still indeed be presumed that the charge is false, but it does not partake of the nature of a libel. A libeller advances charges which he does not intend or is unable to make good."

Francis then proceeds, "This is my defence against the charge as it affects us collectively on the face of our proceedings, and I willingly submit to your judgment whether the avowed ostensible reasons publicly assigned by me be not sufficient to account for my public official conduct on the occasion, and to acquit me of the present charge of contradiction."

This strikes me as a miserable defence. It rests entirely upon a set of paltry quibbles upon the precise words which Francis used in his minute. The plain obvious meaning of it, the meaning which it would convey to any man of plain sense was that Nuncomar's statements were false and disgraceful, and it is impossible that Francis could suppose or wish any other interpretation to be put upon them. What else could be conveyed by burning them by the common hangman? According to the elaborate explanation I have quoted, what really happened

was this. Nuncomar was, in fact, judicially murdered by Hastings and Impey. He said so with his dying breath. He earnestly entreated the Council to interfere in his behalf. Francis believed in the truth of what Nuncomar asserted. Francis insinuated the same thing himself as broadly as he dared in subsequent minutes, yet because Nuncomar's true statement was not supported by evidence, and because his murder had destroyed his credit, Francis deliberately recorded an opinion that this true statement was a libel which ought to be burnt by the common hangman, and this he afterwards justified by saying that by a libeller he understood a man who "advances charges which he does not intend, or," as was the case of Nuncomar "is unable" (having been unjustly hanged) "to make good." Thus according to Francis, a true accusation became a libel fit to be burnt by the hangman as soon as the accused murdered the accuser, whereby the accuser became unable to make good his words. That was what he meant to say by his minute. I do not see how it was possible to carry meanness and prevarication further.

But the importance of this astonishing defence does not stop here. Nuncomar's words were, said Francis, a libel on the Court as a whole, whereas Impey only had been concerned "in that which constituted the deadly "guilt of the transaction." Of the other three judges, Chambers and Hyde were free from all suspicion of a judicial murder. Lemaistre was suspected only on account of his intimacy with Impey.

This is an admission that the conduct of Impey raised no just ground of suspicion at all, for if it had, Nuncomar's statement would not have been unsupported. Impey took a less prominent part in the proceedings

than Hyde and Lemaistre, of whom Hyde was fully acquitted by Francis and his friends, and Lemaistre suspected only because he was said to be on friendly terms with Impey. Where then, was the evidence of Impey's guilt? There was absolutely none except in the statement of Nuncomar which Francis himself declared to be unsupported, of no weight, and as regarded the other judges, of such a nature that it deserved to be burnt by the common hangman as a libel. A dying man says he received his mortal wound from A, B, C, and D. The bitter personal enemy of A, says that as against B, C, and D, the charge is an infamous libel, but that as against A, it is true, though unsupported by any other evidence, and of no weight, because the man who made it was of bad character. Is it not clear that the inference of the truth of the charge against A is drawn from the malice of the person who professes to believe it, not from any evidence alleged to prove it? To put the same thing in a different way. The conduct of all the four judges was identically the same. Three, it is said, were innocent, one was guilty because his motives were bad while theirs were pure. But of the badness of his motives and of the purity of theirs there was no evidence whatever.

The admission that Nuncomar's charge against "Lord Impey and the other judges" was unsupported when it was put forward, has a special importance of its own. It shows that in August, 1775, Francis knew of no evidence of Impey's guilt. If Impey's behaviour at, or before or after the trial, down to the execution, indicated guilt, Nuncomar's charge was not unsupported. Either therefore, what Francis stated in 1775 was untrue to his knowledge; or evidence of Impey's guilt came to light between 1775 and 1788; or Nuncomar's charge remained

unsupported in 1788. But Francis was certainly correct in saying that in 1775 the charge was unsupported. Notoriously no evidence of Impey's guilt came to light between 1775 and 1788. It follows that it was unsupported in 1775, and remained unsupported in 1788, and has now, and never has had, any foundation at all.

Having dealt in this way with the charge made against him as it affected the majority "collectively, on the face of" their "proceedings," Francis passed to the charge as it related more particularly to Clavering. "But had "I," he asked "no other motives for what I did beyond "those which I have assigned? undoubtedly I had, and "I am ready to declare them. Addressing you, as I do, "under an honourable and moral obligation, as powerful "and coercive as any that law or religion can impose "upon the human mind, I should hold myself a perjured "man if, called upon, as in effect I am, for the whole "truth, I reserved any part of it from your knowledge. "My secret predominant motive for proposing to destroy "the original paper produced by General Clavering, "was to save *him* and *him* alone, from the danger to "which he had exposed himself by that rash inconsiderate action. Yet the step I took was not immediately "taken on my own suggestion. As soon as Mr. Hastings "proposed that a copy of the paper should be sent to the "judges—a step <sup>1</sup>suspicious on the face of it, and by "which it was impossible any good purpose could be "answered—Colonel Monson started at it, and desired "me to go with him into another room. Possibly Mr. "Barwell may recollect the circumstance. He (Monson)

<sup>1</sup> Surely the step was one which the commonest justice required, and which would answer the good purpose of giving the Judges an opportunity to defend themselves against the most terrible of all charges!

“then said, ‘I suppose you see what the Governor means. “If the judges get possession of the paper, Clavering “may be ruined by it.’ My answer was, ‘Why, what “can they do to him?’ To that he replied, ‘I know “not what they can do, but since they have dipped their “hands in blood, what is there they will not do?’

“He then desired me to move that the original paper “should be destroyed by the hands of the common “hangman. This short conversation passed very nearly, “I firmly believe, if not precisely, in the terms in which “I have related it. It is not possible I should ever forget “or mistake the substance of it.

“If I am charged with having acted a feeble pusillanimous part, let it be remembered that my fears, whether “well or ill founded, were not for myself; that the “danger, whether real or imaginary, could in no way “extend to *me*. To fear nothing, when we ourselves are “in no danger, is not an unquestionable proof of resolution; much less is it a proof of timidity to fear everything for the safety of a friend. It was my opinion “however, and is so at this hour, that the danger to “General Clavering was real and serious. The author of “the libel was dead. General Clavering had made himself the publisher, and put himself into the power of “his enemies. I cannot bring before you in evidence the “state of the settlement at that time; the great power “that was confederated against us, and the universal “combination of all ranks of Europeans, to support that “power in all its operations. We were sent out by Parliament to inquire into and to reform abuses. The first “discoveries that came before us gave a general alarm. “The cause of Mr. Hastings was made and declared to “be the common cause of all the Company’s servants.

"We, on the contrary, were considered as their common enemy, and were at once the object of their jealousy, their fear, and detestation. With a very few exceptions, we three in effect stood alone against the combined power of two members of the Council, one of whom was the Governor-General, against the Supreme Court of Judicature, against the Board of Trade, and against the united animosity and clamour of the whole settlement. If, in that state and temper of the times, General Clavering had been indicted for a libel on the Supreme Court, whose powers were in effect to us undefined, unlimited, and subject to no control, <sup>1</sup> I cannot positively affirm what would have been the consequence, but I am positively sure that no efforts would have been spared, no methods unattempted to harass and distress him, and if possible accomplish his ruin." He adds, "We had no legal learning, we had no legal advice. You may speculate coolly and wisely upon our conduct, but you will not determine equitably if you do not endeavour to place yourselves exactly in our situation. At all events, whether we did right or wrong, we certainly did not do that of which we are accused. We never said that the contents of Nuncomar's petition were not true." They only said that it was fit to be burnt by the common hangman, as being wholly un-

<sup>1</sup> Here Francis appends a note quoting a passage from a letter of Impey's dated May 15th, 1775, saying: "The bounds between the authority of the Supreme Court and the Council are of too delicate a nature to be discussed without there should be, which I trust there never will be, an absolute necessity to determine them." This letter referred to the bounds between their respective authorities over the treatment of natives in gaol (see Vol. I. p. 99). There was no indistinctness at all as to the jurisdiction of the Court over the members of Council personally, and Impey had pointed this out in another document which they had received shortly before (see Vol. I. p. 198).



supported and of a libellous nature, and that "its being destroyed in the manner proposed would be sufficient to clear the character of the judges so far as they appeared to be attacked in that paper." They wished therefore to clear the character of the judges from an imputation which they believed to be true.

It is difficult to me to believe this statement. Notwithstanding, and indeed a little because of Francis's solemn protestations of his truthfulness, I am disposed to think that in ascribing to Monson the remark quoted he lied. Both Monson and Francis must have known that the <sup>1</sup>Regulating Act exempted the Council from the criminal jurisdiction of the Court, except for treason or felony, and from arrest in civil matters. If they had not known it before it had been pointed out to them by Impey in his <sup>2</sup>observations in Radachurn's case, of which they had had a copy. I can, however, have no doubt that they did know it. In many of their despatches they argue on the terms of the Regulating Act as to their authority, and though people may not study every provision of an elaborate Act of Parliament minutely, they are sure to be acquainted with provisions which confer upon themselves a dignity or privilege. It would require far better authority than the word of Francis, or his oath either, to persuade me that either he or Monson was ignorant of the

<sup>1</sup> 13 Geo. III. c. 63, s. 15: "The said Court shall not be competent to hear, try, or determine any indictment or information against the said Governor-General or any of the said Council for any offence (not being treason or felony) which such Governor-General or any of the said Council shall or may be charged with having committed in Bengal, Bahar, or Orissa;" s. 17: "Nothing in this Act shall extend to subject the person of the Governor-General or of any of the said Council or chief justice or judges respectively for the time being to be arrested or imprisoned upon any action suit or proceeding in the said Court."

<sup>2</sup> See above.

privilege of Clavering. If Monson did speak the words which Francis ascribed to him, he must have known, and Francis must have known, and each must have known that the other knew that they were false, and were uttered only as a false excuse for covering a base action which neither chose to avow, even when they were plotting together.

If Francis's account of this matter is rejected as being either itself a wilful falsehood, or the record of a wilful falsehood told by Monson and accepted by Francis, what is the true account of the matter? I believe it to be simply this: The majority of the Council, and particularly Clavering, cared nothing at all for Nuncomar, and were glad that the Court should, by hanging him, put themselves into a position which might be represented in a hateful light; for this reason they allowed Nuncomar to be hanged without making the smallest effort to save him. When he was hanged it occurred to Clavering that by sending home his petition he might cruelly injure the judges, and this led him to what Francis described as "that rash inconsiderate action of his." As soon as Hastings proposed to send a copy of the petition to the judges, that they might have an opportunity of vindicating themselves, Monson and Francis perceived that Clavering had made a false move. A definite accusation would have brought to a plain direct issue a matter which they wished to nurse up for purposes of calumnious insinuation. If they had forwarded Nuncomar's petition to the Directors and the Secretary of State, they would have made the same mistake as was made by the member of Parliament who accused Wakley of burning his house in order to cheat an insurance company in terms pointed enough to give him an oppor-

tunity of publicly refuting the charge. They thought that Clavering ought to have kept the paper to himself as Francis kept secret for his whole life the letter which he had received from Nuncomar, and they made up their excuse about libel in order to repair their colleague's blunder as well as they could by getting the original paper destroyed. One proof of this is that a month after they supposed that the paper was destroyed they wrote<sup>1</sup> the minute of September 15, already quoted, insinuating the very charge which they had in August declared to be "wholly unsupported." They used Nuncomar's execution as Caleb Balderston used the fire at Wolf's Crag, as an excuse for all deficiencies of evidence in their attacks on Hastings. In short, Clavering was malignant and rash. Francis and Monson were equally malignant, but sly and cool.

This explanation of the matter is, at all events, intelligible. Francis was altogether unable to suggest any other. He begins a long and laboured passage by saying, "I shall not attempt to explain what I never understood, that is, with what intention and for what possible purpose he (Clavering) brought the paper before the Board." He inquires, however, into the question, "Why had he resolved not to make any application whatever in favour of Nuncomar?" After a long panegyric on Clavering's "strict and severely upright" character, and his delicacy, which "bordered if possible on excess," which made him "particularly fearful of the imputation of supporting and encouraging the accuser of Mr. Hastings," Francis observes, "With these principles he might possibly think it did not become him to intercede for a man found guilty of a capital offence," not even if he believed him to be innocent, to be the victim of a foul crime and of

<sup>1</sup> See Vol. I. p. 251.

the very worst of murderers—corrupt judges, murdering under the forms of law—wonderful uprightness and delicacy indeed. “It is much more material,” adds Francis, “to his present vindication that he was well convinced “his intercession would do mischief instead of good, and “would rather hasten than retard the execution of “Nuncomar.” He refers to Farrer’s <sup>1</sup> evidence, which says that when he proposed to the General to receive and transmit to the judges a petition of Nuncomar, addressed to the Governor-General and Council, Clavering’s answer ended with the words, “Nor indeed did he think “it would do any good.” This was not his principal reason, as appears from the extract from Farrer’s evidence given above ; but apart from that the remark is in every way absurd. The question of the petition was discussed on the night of August 1st. Nuncomar was hanged on the morning of the 5th. How could the presentation of a petition on the 2nd, 3rd, or 4th, hasten his execution, and what other mischief could it do ? If it had done nothing else it would, at all events, have greatly increased the responsibility of the Court, for it would have enabled their enemies to say they put him to death in face of the urgent remonstrances of the Council, who called upon them to spare him in order that he might bring Hastings to justice. I believe the truth to have been that success and not failure was what Clavering feared. His doubt as to the petition doing good was not as to its doing good to Nuncomar, whom it might benefit, and could not possibly injure, but as to the good which saving Nuncomar would do to himself and his party. He and his friends saw the use which might be made, and which afterwards was made of Nuncomar’s execution, and they did

<sup>1</sup> See Vol. I. p. 228.

not wish to save him. They had used him against Hastings as far as they could. He was of no further use except as a sacrifice, and they rejoiced at his death on the gallows.

Yet another observation occurs upon Francis's conduct in this matter. Francis was bitterly disappointed at not being put on the Committee of Managers of the Impeachment of Hastings. The subject was hotly debated in Parliament, and Francis complained bitterly of his exclusion. His feelings towards Hastings, he said, were not of the nature of malice, though their intercourse had ended in a duel in which Francis was wounded. With regard to Impey Francis admitted that the state of his feelings was different. He had not only said in the debate on Pitt's India Bill that he would never give a judicial vote in any cause in which Impey might be a party unless he could safely give it for him, but in the speech under consideration after referring to that declaration he added that he had "repeatedly declared to "his friends, and particularly to Sir Gilbert Elliot, that "he would take no part in the prosecution of Sir Elijah "Impey," that "he would not be implicated in any shape "in the impeachment of that gentleman." This proves that Francis, who regarded bitter animosity, sustained over many years and ending in a duel, as a qualification for acting as the accuser of Hastings, looked upon his hatred against Impey as so deadly and so personal that he could not trust himself to take any part in any accusation against him. A fact existed in which this burning hatred might well originate in the heart of one of the most vindictive of men. <sup>2</sup> There was in Calcutta

<sup>1</sup> *Parl. Hist.* xxv. 1225.

<sup>2</sup> This story is told at full length in Mr. Busteed's *Echoes of Old Calcutta*, in which may also be seen the pith of Grand's account of his own life (pp. 198-300).

a man named Grand, whose wife Francis was accused of seducing. It was proved that he got into her bedroom by a ladder in her husband's absence. Grand brought an action against Francis and recovered Rs. 50,000 damages, before a Court composed of Impey, Chambers, and Hyde, sitting without a jury. Chambers dissented. Impey presided. I think Impey was wrong. The evidence fell far short of proof of adultery, although after the action Mrs. Grand was unquestionably Francis's mistress. I also think that Rs. 50,000 was an exorbitant amount of damages for a mere trespass with intent to seduce. This would fully account for the passionate hatred with which, by his own admission, Francis regarded Impey. Notwithstanding his declarations about not taking part against Impey, I believe that he did so in underhand ways, by suggestions to the prosecutors and by anonymous writings. Francis was the most skilful calumniator of his age. Evidence which many people think strong appears to brand him with the infamy of being the author of Junius. The strongest part of it consists of the similarity of his character to that of Junius and his power of writing that peculiar feigned hand by which Junius attempted to disguise himself. <sup>1</sup> He resembled Junius in the union in his person of the character of a devil and the accomplishments of a forger.

After examining every document, and every fact bearing upon this matter with anxious attention, it

<sup>1</sup> A devil etymologically is *διαβόλος* or accuser, but I do not mean to exclude the qualities which the word connotes. As to forgery it seems clear that the MSS. of Junius are in a variety of handwritings, one of which is said to be identical with a disguised hand employed on some occasions by Francis. So far as I have read the Junian controversy, it seems to me to be remarkable principally as an illustration of the way in which learned and accomplished men fail to distinguish between more or less clever guesses and proof.

appears to me that the only foundation for the monstrous load of infamy laid upon Inpey is to be found in the letter of Nuncomar to Francis, which Francis suppressed, and in the petition of Nuncomar to Clavering, which Francis caused to be burnt as an unsupported libel in 1775, and procured to be turned into an article of impeachment in 1788.

The subsequent history of the charge seems to have been as follows: For many years no definite accusation was brought against Inpey in relation to Nuncomar, but after thirteen or fourteen years without the discovery of a single additional fact, a charge was framed on the very evidence which had been known to his enemies for the whole of that time. This convinces me that the charge which ultimately was brought, and which the House of Commons refused to entertain, was simply the result of unsupported suspicions, originally inspired by Nuncomar into Francis and Clavering, though they were undoubtedly shared by the natives to whom in all probability, injustice in judges and oppression in governors appeared the natural course of things. These suspicions the majority of the Council nourished without evidence, for the purpose of making against their enemies insinuations which they knew they could not prove, and which, at the time, they did not even believe to be true. Francis nursed them for thirteen years, after which he perhaps came to regard them as self-evident truths.

His pertinacious and undying animosity infected Burke, who eagerly adopted the suspicions as truths because they fell in with his own furious hatred against Hastings. Fox and Elliot assumed the truth of what was asserted by Burke and Francis.

Each was a warm-hearted, generous man ; each (particularly Fox) was an ardent partisan. The fact that his party attributed atrocious crimes to a particular person, and especially to a lawyer—for Fox hated lawyers—was to each sufficient proof that the crimes imputed had been committed, for party generates a faith as ardent as religion. Their natural generosity of feeling filled them with a detestation of the atrocities which they had come to believe, and the result was that a belief in the crimes of Hastings, and the infamies ascribed to Impey, became a part of the Whig tradition, and thus found its way into the only writings upon Indian subjects which have ever been popular—as regards Hastings with considerable modifications, but as regards Impey in a compact, condensed form, which has irretrievably damned his memory. I am sorry for him. I believe him to have been quite innocent ; but this book will be read by hardly any one, and Macaulay's paragraph will be read with delighted conviction by several generations. So long as he is remembered at all, poor Impey will stand in a posthumous pillory as a corrupt judge and a judicial murderer.

Besides his vindication of his own character Francis in the pamphlet in question makes two reflections upon Hastings and Impey, in which I think he is more successful than in his defence of himself. First he points out that Hastings violated his oath of office in communicating the copy of Nuncomar's petition to Impey and his brethren, and secondly he observes that the communications thus secretly made after the resolution taken in Council to have the original and all copies of it destroyed, prove a degree of intimacy between Hastings and Impey, which tends to discredit Impey's



assertion that the judges knew of Nuncomar's charges against Hastings only by vague rumour.

In each of these observations there is, I think, some degree of weight. I do not know the terms of the oath of secrecy, nor are they in my opinion of any great interest or importance. Oaths of such a nature never bind closely, and it is one of the great objections to their use that if they are rigidly enforced they often do cruel injustice, and that if tacit exceptions to them are admitted they not only become useless for the immediate purposes for which they are imposed, but are also snares to the honesty of those who take them. Whether in the particular case there was any moral guilt in the breach of the oath of secrecy, and whether its terms were or were not subject to exceptions, express or implied, are points on which I express no opinion, but I have no doubt that apart from the oath of secrecy it would be not only excusable in Hastings to inform the judges of the attack made on them, but it would be his imperative duty to do so. It furnished them with an answer to an attack which Hastings's sagacity probably foresaw, and to which they had a right.

As to the connection between Hastings and Impey proved by this communication, I think it proves no more than was always known, namely, that they were on intimate terms. I do not know that if there were not other evidence on the point it would prove even that. If they had been strangers the communication would not have been unnatural. It, however, greatly weakens Impey's argument that he had no means of knowing the particulars of Nuncomar's accusations against Hastings, because they were made in the Secret Department under an oath of secrecy.

Of Hastings's conduct to his colleagues I will say only that if he had acted openly he would have done better than he did, but his conduct was very characteristic. He was apparently a curiously cautious, secret man. Some years after this Impey complained bitterly that Hastings made his attack on the Supreme Court without the smallest warning of any sort, and while they were living in close intimacy. And other instances of a similar kind occur in his career.

Impey's answer to the pamphlet written by Francis turns mainly upon the obvious topics which are dealt with above, but in a manner which does not much favour quotation. The following passages, however, may be cited, both for their own sake, and as specimens of Impey's style, which to me appears manly and nervous. I preserve his italics.

"It" (Nuncomar's petition) "was then a libel because "it imputed guilt to all the judges collectively, and did "not distinguish them from Sir Elijah Impey, to whom "alone the whole guilt was to be imputed. Every publication, therefore, which attributes the guilt to them "collectively and not to Sir Elijah, *is a libel*. This is "said to be no new distinction by Mr. Francis, no after-thought, no *ex post facto* vindication.

"The question, as stated for Mr. Francis, is put thus : " 'The question is, whether by those declarations' " (the declarations at the time of condemning the paper) " 'he " 'contradicts many others, in which he has charged the " 'prosecution and execution of Nuncomar on Sir Elijah " 'Impey, as a political measure of the most atrocious " 'kind.'

"By this must be understood the many declarations in "which he has charged this on Sir Elijah singly, for it is

“admitted by him that to make the charge on all the judges collectively is a libel.

“To support this position several minutes are produced. This is said to be his (Mr. Francis’s) defence against the charge, as it affects the Council collectively.”

After specifying the minutes, and distinguishing those which preceded the execution of Nuncomar, Impey says, “The other minutes are directed against the whole Court, against the judges collectively. Not one of them discriminates the conduct of Sir Elijah Impey from that of the other judges by the most distant allusion. Not one of them has the least tendency to exculpate any of the judges. These, therefore, by the admission of Mr. Francis himself, are libels. The writing of these minutes is absolutely irreconcilable with the idea of condemning Nuncomar’s petition as a libel, *because it included all the judges*, for the minutes themselves *equally include them all*; these must be libels if that was, and *they* ought to be treated (to use Mr. Francis’s own words) ‘as a libel against a whole court of justice’ ‘ought to be treated.’ It does not appear to be true from anything that has been said or published, that Mr. Francis ever *did* charge Sir Elijah Impey singly. It at present, therefore, carries every suspicion of being what it is denied to be, ‘a new distinction, an after-thought, an *ex post facto* vindication.’

“Can Mr. Francis say that before this paper was produced at the Bar of the House of Commons he had ever revealed the contents of it to his most confidential friends? Can he say that he ever before made *this* defence? The manner in which the attention of the public has been called to this subject makes it highly incumbent on him to produce *one minute, one declaration*

“at least, in which he has charged Sir Elijah Impey  
 “singly, as is asserted with ‘this political measure of the  
 “‘most atrocious kind.’ It is the act of a friend to  
 “advise him to do it, his friends and the public expect it.  
 “He is in time yet to urge it against Sir Elijah Impey.  
 “No decision has yet been passed on the first article. He  
 “would not have asserted it if he could not do it, and he  
 “will not shrink from it. Let him produce *one*.

“It will be an extraordinary case indeed, if one judge  
 “was able to execute so atrocious a measure, two of the  
 “other judges being admitted to be under no suspicion of  
 “corrupt motives, and the third only suspected from being  
 “intimate with the corrupt judge, from acting as his  
 “instrument on all occasions, and from the notorious  
 “violence of his temper.”

After some remarks on the character of Lemaistre, in which he hints amongst other things at the fact that Lemaistre passed much of his time at cards with Francis, and states openly that there were great differences between Impey and Lemaistre, Impey proceeds as follows :

“But Mr. Francis’s character is treated with still  
 “greater freedom by <sup>1</sup>this author, who makes him de-  
 “clare with the most complete *sang froid*, ‘That he did  
 “‘not hesitate to declare in the most explicit manner,  
 “‘that the *private motive* of his standing so forward as  
 “‘he did, for the destruction of the copy and translation  
 “‘of the petition, sent by Nuncomar previous to his  
 “‘execution to General Clavering, was not the public  
 “‘one assigned.’

“Does he esteem it a trifling matter to put false  
 “reasons on a record which the Parliament has required

<sup>1</sup> *I.e.* Francis himself.

“to be laid before the King’s ministers, as official  
“authentic intelligence of the acts of the Council and  
“the special reasons of those acts?

“After such an avowal, who is to distinguish on the  
“public records of the Company what are his true  
“reasons, from those which he may afterwards ‘in the  
“‘most solemn and explicit manner,’ ‘on his honour,’ and  
“‘on his oath,’ ‘not hesitate’ when pressed ‘to declare  
“‘not his true reasons,’ but that ‘he was really actuated  
“‘by some private motive?’

“What a door does this open against him? What  
“*private motives of ambition and vengeance*, after such a  
“declaration had been advanced by himself, might not  
“those who are not inclined to think well of him, assign  
“for many public acts, of which he has himself perhaps  
“given the true and honest reasons?

“Let us now suppose the reasons assigned on the  
“record to have been only ostensible, let them be  
“expunged and every memorial of them be destroyed,  
“let the true operative motive be substituted in their  
“place. It was his fear for the safety of General Claver-  
“ing, Colonel Monson and he observing that the judges  
“had gone all lengths, that they had dipped their hands  
“in blood for a political purpose, and that they might  
“again proceed on the same principle.

“This was a reason totally incompatible with that as-  
“signed for condemning the paper as a libel, this was an  
“unequivocal accusation of the judges collectively and of  
“the whole Court, not of Sir Elijah Impey separately.  
“The judges, not Sir Elijah Impey, had gone all lengths,  
“for they, not Sir Elijah Impey only, had dipped their  
“hands in blood for a political purpose, and the fear was,  
“that they, not he only, might again proceed on the same

“principle, and commit another legal murder on the  
 “person of General Clavering. What is become of their  
 “want of suspicion of Sir Robert Chambers and Mr.  
 “Justice Hyde now? Was all this fear for the safety of  
 “General Clavering on account of Sir Elijah Impey  
 “alone? Mr. Justice Lemaistre was then suspected only  
 “from his intimacy with Sir Elijah Impey. Was it thought  
 “that he was so much an instrument of Sir Elijah, as to  
 “have aided him in inflicting a capital punishment on  
 “the General? and for what? For what was esteemed  
 “publishing a libel.”

After pointing out the impossibility of believing this story to be true, on the grounds already given, Impey again proceeds :

“What right has Mr. Francis *to attribute*<sup>1</sup> *their conduct*  
 “*to other motives than what they have assigned*, and to  
 “throw so gross an imputation on the memory of his  
 “deceased friends, as that of having recorded themselves  
 “liars? Can common sense endure that his testimony  
 “should be received to prove that the panic operating on  
 “the minds of him and Colonel Monson had force suf-  
 “ficient to induce them to condemn a paper as a libel,  
 “which in their consciences they then thought true, and  
 “which Mr. Francis still thinks true, and so add a stigma  
 “to the memory of a man whom they knew to be falsely  
 “condemned to death, because he had justly remonstrated  
 “against the iniquity of his sentence?

“Was this a cause that could produce such effects?  
 “Was this a fear, *qui cadere potest in virum constantem*?  
 “The assigning of such a fear as a motive, had those  
 “gentlemen been alive, might have been the cause of  
 “more real danger to Mr. Francis than the supposed

<sup>1</sup> The conduct of the majority of the Council. The italics are Impey's.

“publication of the libel could have been to the General. Would either of those gentlemen have borne that such a defence should be set up for him with impunity? Would that brave man whom Mr. Francis represents as dying in the service of his country, not in an honourable but an odious service, not in the field of battle, where his gallant mind would have led him, but in an odious unprofitable contest—would he have suffered himself to be protected from such a danger in such a manner? Would the Colonel have borne to hear such a concurrent motive assigned to himself? Would he have thought it honourable to the General to have falsified the record for his protection against such a fictitious danger? If their fears were so predominant on the 16th of August as to produce these extravagant effects, how came they so far dissipated, that the same persons should on the 15th of September following, adopt in their own name, what through fear only they had condemned in the petition of the convict? If it was dangerous on the 16th of August, why was it less so on the 15th of September? Their fears in August were that they were betrayed by a member of their Council to Sir Elijah, had that suspicion ceased in September?”

The conclusion is as follows:

“Mr. Francis is supposed to have professed a neutrality during the prosecution of Sir Elijah Impey. That he has professed this is not doubted, but that he has not kept it has been visible to those who have attended to his behaviour while it was proceeding.

“Sir Elijah may possibly have no reason to wish that he had preserved his neutrality. He is probably under no apprehensions of him as an informer, for his fund of

“intelligence must have been long ago exhausted. The  
“zeal and activity of a professed enemy, satiating his  
“vengeance as a prosecutor, ever acts on a generous  
“people in favour of the party prosecuted. <sup>1</sup> This Mr.  
“Francis has already experienced. In neither of these  
“characters can he be dreaded.

“Mr. Francis, who must be acquainted with the temper  
“of his own heart, has more than once declared that, on  
“account of his disposition to Sir Elijah Impey, ‘he  
“‘would never sit in judgment on him, nor ever give  
“‘a judicial vote in any cause in which Sir Elijah might  
“‘be a party, unless he could safely give it for him.’  
“Passions do not argue logically or make metaphysical  
“distinctions, they do not distinguish accurately the cases  
“that are favourable or unfavourable to those against  
“whom they have been excited. After that declaration,  
“notwithstanding the qualification annexed to it, he  
“is most certainly to be dreaded by Sir Elijah Impey  
“should he ever become his judge. There is another cha-  
“racter, in which he may for the same reason be feared,  
“that of a witness. If neither of these characters be  
“assumed his friendship or enmity must be matter of  
“indifference.

“It is not Sir Elijah Impey who has marked him as an  
“enemy.<sup>2</sup> He has by his public declarations marked him-  
“self as the enemy of Sir Elijah, who only gives credit  
“to those declarations in asserting that he is so. From  
“the picture of his own heart delineated by Mr. Francis

<sup>1</sup> This alludes to the refusal of the House of Commons to make Francis a manager upon the impeachment of Hastings.

<sup>2</sup> In this and a few other places I have substituted a full stop for a comma in the original.



“himself when he made them, Sir Elijah Impey’s must  
“be deformed indeed, if it does not appear to advantage,  
“when placed, as Mr. Francis desires that it should be,  
“in opposition to his. Let Mr. Francis really desist from  
“assuming the character of a judge or witness and there is  
“no reason that Sir Elijah Impey should not treat his  
“eternal hostility with everlasting contempt.”

## CHAPTER XI.

### OF THE QUARREL BETWEEN THE GOVERNOR-GENERAL IN COUNCIL AND THE SUPREME COURT.

I HAVE given some account already of the relation between the Governor-General's Council and the Supreme Court which led to the impeachment of Impey. I propose in the present chapter to describe the leading incidents in the quarrel, and in particular those on which were founded the remaining articles of impeachment against Impey. These charges were, first, that Impey had misconducted himself in a cause known as the Patna Cause. Secondly, that he had unwarrantably and for corrupt purposes of his own extended the jurisdiction of the Supreme Court. Thirdly, that he had misconducted himself in a cause called the Cossijurah Cause. Fourthly, that he had corruptly accepted the office of Judge of the Sudder Diwani Adalat. Fifthly, that he had corruptly abetted Warren Hastings in certain proceedings for which Hastings was then under impeachment, by improperly taking affidavits intended for his justification. No one of these charges was ever proceeded with. As, however, they relate to an exceedingly curious incident in the history of British India, as they are connected, though in

an indirect way, both with the story of Nuncomar and that of Warren Hastings, and as they have been greatly misunderstood and misrepresented, I propose to give an account of them. All, except the charge relating to the affidavits form part of a single topic, the quarrels between the Supreme Court and the Governor-General and his Council, which lasted till Impey left India, and which, long after his death, broke out again in different forms.

As I have already explained, the East India Company as a corporation, and its leading servants in India, both civil and military, were greatly disposed to regard the sovereignty of India as their own private property, and to resent all interference with it by Parliament as a wholly unwarrantable and tyrannical invasion of their rights. They spoke of the sacred rights of the Emperor and the Nabob of Bengal just as the mayors of the palace may have stood up for the rights of the *Rois fainéants*. The policy of Parliament was to assert the rights of the King of England and to establish in India institutions by which those rights might be maintained. This policy was, however, adopted in a way characteristically vague and imperfect. Like many later statutes the <sup>1</sup>Regulating Act used language involving problems, the solution of which was left to those who had to work it, because Parliament, either from ignorance or from timidity, did not choose itself to solve, or even to study, them. Some parts, both of the Act and the Charter, appear to give the Supreme Court jurisdiction over every one in Bengal, Behar, and Orissa, and at least <sup>2</sup>one provision in

<sup>1</sup> 13 Geo. III. c. 63.

<sup>2</sup> S. 4 of the Charter makes the judges "justices and conservators of the peace and coroners within and throughout the said provinces, districts, and countries of Bengal, Behar, and Orissa, and every part thereof, and to have such jurisdiction and authority as our justices of

the Charter was capable of a construction which would have given the Supreme Court superintendence over the whole administration of justice in Bengal. It would be tedious, and in such a work as the present inappropriate, to go into a detailed inquiry into the true legal meaning of various expressions which in different parts of the Act and Charter describe the persons who were to be subject to the jurisdiction of the Court. They are sometimes called <sup>1</sup> "all British subjects who shall reside in the "kingdoms of Bengal, Behar, and Orissa, or any of them "under the protection of the said United Company." <sup>2</sup> Sometimes "his Majesty's subjects" are contrasted with "any inhabitant of India residing in any of the said "kingdoms." The <sup>3</sup> Charter refers to "subjects of Great "Britain, of us, our heirs, and successors," as qualified to be jurymen in criminal cases at Calcutta. No definition is given of any of these expressions, though their meaning is by no means plain.

In one sense the whole population of Bengal, Behar, and Orissa were British subjects. In another sense no one was a British subject who was not an Englishman born. In a third sense inhabitants of Calcutta might be regarded as British subjects, though the general population of Bengal were not. Each of these possible interpretations, and I will not say that there may not have been others, had its own special inconveniences and recommendations.

That these difficulties in the interpretation of the

"our Court of King's Bench may lawfully exercise within that part of "Great Britain called England by the common law thereof." This might have been so construed as to enable the Court to issue writs of mandamus, prohibition, and *certiorari* to every court in Bengal, and to issue a habeas corpus to any native to bring up the women in his zenana.

<sup>1</sup> 13 Geo. III. c. 63, s. 14.

<sup>2</sup> *Ibid.* s. 16.

<sup>3</sup> S. 19.

Regulating Act were of a substantial kind, appears from detailed discussions on the subject in the papers printed in 1831 by the Select Committee which sat to collect materials for the Charter Act of 1833.

I quote a few lines from these papers in order to show that in 1829, when the early quarrels between the Council and the Court had become matter of history, persons of the highest eminence considered that the view which the Supreme Court in Hastings's time took of its jurisdiction was so far from being exaggerated, that it was narrower than, upon mere technical rules of construction, it should have been.

<sup>1</sup> In an elaborate minute, Sir C. E. Grey, then Chief Justice, after a full examination of the authorities, says : "Upon these grounds and authorities I could not come "to any other conclusion than that if the Act of 13 "Geo. III. c. 63, and the Charter of Justice of 1774, "which are the foundations of this Court, were at this "time to be interpreted by themselves and not in refer- "ence to a scattered flight of subsequent enactments and "ordinances, the Court throughout the provinces which "constitute this presidency would have a jurisdiction, "however inconvenient, over all persons who, according "to the ordinary rules of English law, should be subjects "of the Crown, whether absolutely or temporarily. But "it is scarcely necessary for me to say that I do not "consider the Court to possess that jurisdiction in such a "way as to be used for any practical purposes at the "present time."

<sup>1</sup> Fifth Appendix to the Third Report of the Select Committee of the House of Commons, pp. 1125-1158, dated October 2nd, 1829. The passage quoted in the text is at p. 1144. Many other elaborate papers on the subject, especially a minute by Sir C. Metcalfe (April 15th, 1829, pp. 1069-1088), are to be seen in the same place.

<sup>1</sup> In a letter from the judges of the Supreme Court (which seems to have been written in 1829) to the Board of Control, similar opinions are expressed. The judges say: "It is in truth a matter of great difficulty to show "with any certainty in what relation it was that the "Legislature then" (in 1773) "meant it to be understood "that the Bengal provinces and the inhabitants of them "were placed." They then point out that, according to the practice and decisions, Hindoos and Mohammedans had been excluded from the jurisdiction of the Courts, and they suggest that that was rather convenient than technically correct. "It would not perhaps have occurred to the "present judges of the Supreme Court to have laid down "this rule of construction, if they had been called upon "to look at the statutes without any reference to usage. "But it is certain that a usage has prevailed of proceeding "as if that part of the jurisdiction of the Supreme "Court which belongs to it as a court of Oyer and Terminer did not extend to the mass of the Indian population beyond the limits of Calcutta, and it is scarcely "necessary to observe that if it did it could not be effectually exercised. We should be at a loss, however, to "say upon what legal grounds any class of the Indian "natives could be considered to be not personally liable "to the Court of Oyer and Terminer for crimes committed "in any part of the Bengal Presidency, if it could be shown "that they were of any class which in 1774 was manifestly "and unquestionably subject to the Crown; and it seems "to be at the least very doubtful whether <sup>2</sup> natives of "Calcutta must not have been so."

<sup>1</sup> *Ibid.* p. 1113. No date or signature is given.

<sup>2</sup> Not inhabitants. The local jurisdiction over Calcutta was perfectly clear, and is assumed in the earlier part of the sentence quoted.

The vagueness of the language of the Act arose, as I have pointed out, from the fact that its authors did not wish to face the problem with which they had to deal, and to grapple with its real difficulties. They wished that the King of England should act as the sovereign of Bengal, but they did not wish to proclaim him to be so. They wished not to interfere in express terms either with the Mogul Emperor or with the Company which claimed under him. Hence the obscurity of the language about British subjects. This fundamental obscurity, showed itself in another way. The relation between the Council and the Court was left undefined. The Council was invested with <sup>1</sup> "the whole civil and military government of the said presidency, and also the ordering, management, and government of all the territorial acquisitions and revenues in the kingdoms of Bengal, Bahar, and Orissa." <sup>2</sup> The Governor-General and the Council were exempt from the criminal jurisdiction of the Courts except in cases of treason and felony, and <sup>3</sup> they were not liable to be arrested or imprisoned, but there is nothing else in the Act to exempt them from the responsibility to which all European British subjects, and all servants of the Company were, on the narrowest possible construction of the Act, made subject. There was nothing to say what part of the institution over which they presided was to be regarded as having a legal character of its own beyond the following vague expression: The management, &c., was vested in them, "in like manner to all intents and purposes whatsoever, as the same now are or at any time heretofore might have been

<sup>1</sup> 13 Geo. III. c. 63, s. 7.

<sup>2</sup> S. 15.

<sup>3</sup> S. 16.

“exercised by the President and Council or Select Committee in the said kingdom.” It was quite consistent with this that Parliament might intend to authorise the Supreme Court to decide what, in fact, the powers of the Governor and Council were, and how far the various institutions by which the government of the country was being carried on were lawfully established, such questions being raised from time to time by actions brought against servants of the Company, or against the Company itself, for acts done in their official capacity. I think, indeed, that this consequence was not only involved in the language of the Act, but was intended to follow by its authors. To protect the natives against oppression was the purpose for which, on many occasions, the Court was alleged to have been established, but, according to the whole order of ideas current in England in the eighteenth century, the only way of effectually preventing oppression was by subjecting every one to actions in the courts at Westminster for any illegal act which he might commit, especially if it were done in any official or public character. Hence the Governor-General, every member of Council, and every servant of the Company, was by the Act rendered liable to an action for every one of his acts, official or otherwise, by which any person’s private interests were injured.

Again, all the parties concerned agreed that the powers of the Supreme Court superseded, at least in Calcutta itself, the powers of such Company’s courts as there were there, except only those which related specifically to the collection of the revenue. In this state of things it is not surprising that the Council should have looked with much suspicion on the Court and its proceedings, or that the proceedings of the Court, whether legal or not, should have



given the greatest offence to the Council. The history of their relations can still be clearly traced by reference to the appendices to the report on Touchet's petition. They are four in number, and contain a large number of papers, in which all the principal matters in debate between the two bodies are described. <sup>1</sup> The order in which they are arranged is extremely puzzling, as it depends upon the arrangement of the despatch in which they are enclosed, but when arranged and read in order of time they appear to me to set in a sufficiently clear light a chapter of Indian history which has been much misunderstood.

The first paper to be noticed is a <sup>2</sup> letter from Impey to the Secretary of State (Lord Rochford), dated March 25th, 1775, giving his first impressions as to the administration of justice. He says that "the town of Calcutta, "by the great credit which the English Government "has within these few years obtained, is become extremely populous, and its black inhabitants are daily "increasing. They are extremely litigious. Were the "judges to sit only on causes between the black inhabitants of Calcutta, they could not go through with one "half of them." Additional courts for causes up to Rs. 500 should be established for Calcutta, and, if possible, in the provinces, and the judges ought to go on circuit. Additional justices of the peace are greatly wanted, and Impey suggests a cotwall, or native police magistrate, for each of the thirty-one wards into which Hastings had

<sup>1</sup> The volume in which these papers are printed is not even paged. The appendices are the Patna Appendix, the Dacca Appendix, the Cossijurah Appendix, and the General Appendix. The only possible mode of reference is by specifying the appendix and the number of the enclosure or sub-enclosure.

<sup>2</sup> Gen. App. No. 32.

divided Calcutta. He shows how unsuitable secondary English punishments were for India. Transportation could not be carried out. "Imprisonment to the inferior indolent Indian is no punishment; give him a space to lie upon and rice and water, it is a reward." It is remarkable that he does not refer to whipping. Amongst these and other observations he says: "The Governor-General and Council have been much alarmed lest their officers should have actions brought against them for acting under their authority in the courts in which they preside, and in the collection of the revenues. I have offered my service to attend as assessor" (I suppose to the Council), "not claiming any voice, but simply to advise, hoping that it might give a degree of sanction to their legal proceedings, or prevent unnecessary suits against their officers to the embarrassment of their business and the prevention of the speedy collection of the revenues. If my offer should be accepted, I hope it will meet the approbation of His Majesty, as I do it from no interested views, but for the good of the Company."

<sup>1</sup> By the same fleet the Governor-General in Council informs the Company that the line between the jurisdiction of the Supreme Court and the Country Courts is not yet drawn: "We understand, however, that the Supreme Court have declared peremptorily against any other criminal jurisdiction existing in Calcutta than that established by the Charter." The extent of their civil jurisdiction, it is said, is still undecided. This moderate, and indeed neutral, statement, was very shortly afterwards followed by a <sup>2</sup> minute, dated

<sup>1</sup> Letter of March 24th, 1775 (Gen. App. No. 3, encl. 3).

<sup>2</sup> Gen. App. No. 3, encl. 1.

April 11th, 1775, by Clavering, Monson, and Francis, censuring the conduct of the Court and of the judges in the strongest terms. The Council of Moorsheda-bad are said to have complained that the native diwan of that division had been arrested on mesne process, which had produced universal alarm. The particulars of the action in which he was arrested are not stated; similar proceedings, however, are said to have taken place at Dacca and in the neighbourhood of Calcutta. The minute goes on to say that if the officers by whom the revenue is collected are to be liable to arrest for acts done in the discharge of their official duty, and if debtors arrested by them in order to compel the payment of arrears are to be set at liberty by writs of *habeas corpus*, it will be impossible to collect the revenue. It is stated that the Diwani Adalat in Calcutta "has been totally suspended. The phousdarry cutcherry, or criminal court, is abolished," and the Supreme Council has refused for some months to hear appeals, lest its decrees should be set aside. The authors of the minute add that the proceedings of the Court appear to them to violate the spirit of the Charter and of the Act, and that they cannot "discover in the judges any traces of that moderation and discretion which might have been observed" by them. Finally, they press upon the Directors the importance of reducing the jurisdiction of the Supreme Court.

Impey's letter and the minute of Clavering, Monson, and Francis, mark, as it appears to me, the moment at which the quarrel between the Court and the majority of the Council began, or at least broke out openly. It will be observed that it was wholly unconnected with the proceedings against Nuncomar and preceded the

accusations brought against him by Hastings and Mohun Persaud, though the minute which I have just referred to was almost immediately followed by those proceedings in relation to the prosecutions against Nuncomar which I have already examined in detail, and which in themselves constituted a deadly quarrel between the Court and the majority of the Council.

Other subjects of dispute, however, arose in rapid succession. The first of these was the case of Commaul O Dien, to which I have referred in passing already. His case brought up for the first time questions of great importance between the Court and the Council.

The particulars of it are to be found in <sup>1</sup> two papers published in the General Appendix to the Report of Touchet's Committee. The Governor-General and Council state the matter thus: Commaul O Dien having been committed in execution by the Council of Revenue of Calcutta for an arrear of revenue due from him as farmer of the revenue for Hidgelee, obtained a writ of *habeas corpus* from the Supreme Court. The return was excepted to as defective in form, because it did not "express a power "in the Council of Revenue to commit without bail or "mainprize, although words to the same effect were "inserted." Thereupon the Court ordered the President of the Council to admit Commaul to bail, and said he was not to be taken in custody again till his under-renter had been called upon to pay the arrears and had proved insolvent. This the Governor-General and Council regarded as a usurpation on their rights as diwan. They considered that the Regulating Act, which gave them

<sup>1</sup> No. 3, encl. 14, Governor-General in Council to Directors, September 16th, 1775; encl. 25, Impey to Court of Directors, September 19th, 1775.

“the ordering, management, and government of the “revenues,” gave it to them exclusively, and that the Supreme Court were “not empowered to take cognisance of “any matter or cause dependent on or belonging to the “revenue.” For this reason mainly they expressed their opinion that the proceedings “in the release of Commaul “O Dien exceeded the limits of the Court’s jurisdiction, “and were against law.” Upon these grounds “it was “the unanimous opinion of the majority that we ought “to direct the Provincial Council” to imprison Commaul and his security, and to keep them in custody till they had paid their arrears,<sup>1</sup> and also that they should give “no attention to any order by the Supreme Court or “any of the judges in matters which solely concern the “revenue.”<sup>2</sup> “One of the members of the majority, however, having declared” that he would not assent to these measures proposed, unless they were supported by the concurrence of the Governor-General; and the Governor-General having refused his support, this opinion remained without effect.

This view, which made the Council, and not the Court, the final judge of the true interpretation of the provisions of the Regulating Act, appears to me an outrageous assertion of military power against law. It would have led straight to civil war in the streets of Calcutta, and it is to be observed that the decision of the Court was subject to appeal to the King in Council, whereas the act of the Council in refusing to submit to the jurisdiction of the Court was in its nature subject to no appeal at all.

<sup>1</sup> Is it credible that men prepared to take such a responsibility as this should, as alleged by Francis, have been actuated by abject terror when they ordered Nuncomar’s petition to be burnt

<sup>2</sup> It does not appear which of them it was.

Impey's letter seems to me to set the ignorance and violence of his opponents in a striking light. He goes minutely through the facts, points out various instances of improper conduct on the part of the Committee towards Commaul, observes that the defect in the return was not technical, but that the omission of the words alleging a right to imprison without bail was intentional. If they had been inserted the return would have been false, as Mr. Cottrell, the President of the Revenue Council, said that bail was taken in such cases, and "had it not," adds Impey with perfect truth, "in cases of disputed demands, nothing could be more unjust and oppressive." The usual form of the bail bond was that the prisoner should appear before the Committee when he should be called on. The Court required the Committee not to imprison Commaul in an arbitrary way for a disputed account, but to admit him to bail according to the usual practice and in the usual form, and not to require his appearance "until endeavours had been made, without effect, to recover the money from the under-tenant." This, said Impey, appeared, upon "the best and most undoubted authority," to be the common course in cases in which an under-tenant had been recognised by the revenue authorities. It is obviously the course which common sense would require.

In the latter part of his letter Impey pointed out the principle on which the Court proceeded, and its application to the particular case, in the following words: "The gentlemen do not make the distinction which is most obvious between claiming a jurisdiction over the original cause, and preventing their ministers, under the colour of legal proceeding, from being guilty of the most aggravated injustice. This distinction, if attended to,

“is of itself sufficient to clear away everything that can  
“give the least alarm on the account of the interests of  
“the Company; for the Court, allowing the custom and  
“usage of the collections to be the law of the country, have  
“only compelled the officers of the Government to act conformable to those usages, and not to make use of the  
“colour and forms of law to the oppression of the people.

“No cause could be more pregnant with causes  
“of suspicions of that sort than the present; the  
“prisoner had made himself obnoxious to several  
“members of the Council by an <sup>1</sup> information which he  
“exhibited before all the judges on April 19th, in a  
“matter in which the several members of the Council  
“were either parties, or had much interested themselves.  
“On the 24th the parties were bound over to prosecute.  
“On May 1st the accountant laid the account before the  
“Committee, and peons were ordered to be set upon the  
“prisoner; his vakeel (that is, his agent) was, without  
“any colour of law, imprisoned for the same demand  
“during the trial of the cause, in which he, Commaul,  
“was the principal evidence. Immediately after the  
“trial he was himself ordered into confinement, and for  
“that purpose the course of proceeding in the Committee  
“was inverted. Before and during the trial the pretended  
“claim of Government was used for the purpose of intimidation; and after, for that of punishment; and the  
“whole influence of Government is now drawn down on  
“this Court for not submitting to so manifest an outrage  
“to justice.”

Not long after this <sup>2</sup> another matter happened which is worth notice, because it bears upon the relations between

<sup>1</sup> Namely his information against Nuncomar. See above, p. 79-80.

<sup>2</sup> No. 3, encl. 18, November 29th, 1775, Governor-General in Council to East India Company.

Impey and Hastings. The production of certain public documents in the possession of the Council was required in an action. The Council, by a majority consisting of Hastings, Monson, and Francis, refused to produce them, Barwell voting for their production and Clavering giving no opinion. The secretary to the Council being called, Impey compelled him to disclose the names of the members of Council and their votes, and stated his opinion that the individual members, who by their votes prevented the production of the papers, would render themselves liable to an action. The Council made strong representations on this subject to the Company. I think the Court might well have modified the English law of evidence, as they seem to have understood it, to meet the circumstances of India by accepting certified extracts, or by taking the oath of the secretary to Government as sufficient proof that on public grounds the disclosure of any particular paper was not expedient. This is the modern English practice.

The matter was not in itself one of any great practical importance, though it shows that Impey was not subservient to Hastings; but it nearly coincided in point of time with a <sup>1</sup> minute of the majority of the Council, which shows how matters stood between them in the beginning of 1776. I add in notes a few of the more pointed of Impey's criticisms on it. They are to be found in his <sup>2</sup> letter to the Secretary of State, Jan. 26th, 1776. The important part of the minute is as follows:

"In spite of numberless discouragements, our endeavours to serve the Company have not entirely miscarried; "if more shall be expected from us, the power and the "means must be proportioned to the end: considering

<sup>1</sup> No. 3, encl. 5, Jan. 15th, 1776.

<sup>2</sup> Gen. App. 3, encl. 28.



“the opposition and resistance we meet with from every quarter, we are, in truth, unable to determine, whether any and what power is left to this government. If by our authority as diwan confirmed to us by Parliament, a farmer be confined for arrears of rent, the Supreme Court of Judicature take the cause out of our hands, <sup>1</sup> decide upon the merits, and discharge the prisoner; if we dismiss the Judge Advocate, <sup>2</sup> he applies to the Supreme Court for a mandamus to reinstate him in his office; if we dismiss the secretary of our own board, we see him <sup>3</sup> encouraged to bring an action for the salary against his successor; if we order a British subject to repair to the Presidency, he pleads the protection of the Supreme Court of Judicature, and declines or refuses to obey us; if, for reasons of the most serious political importance, we endeavour to support the authority of the country government, and the sovereignty of the Suba, we have not only the foreign factories; but the Supreme Court of Judicature immediately to contend with: they publicly deny the existence of such a government, and affectedly hold out the person and authority of the prince to the contempt of the world.

“<sup>4</sup> According to the doctrines maintained by the judges,

<sup>1</sup> This is again the case of Commaul: “It is not true that the Court have decided on the merits” (Impey, No. 3, encl. 28).

<sup>2</sup> “It can hardly be imputed as a crime to the judges that an application is made to the Court. Had they been candid they would have stated that the mandamus was refused, and on grounds which would ever after prevent application of that nature. The Court declared they had not authority to grant it” (Impey, *ubi supra*).

<sup>3</sup> “By whom do they see him encouraged? Not by any judges of the Court. It seems to be insinuated; they will not assert; they know it not to be true” (Impey, *ubi supra*).

<sup>4</sup> “These doctrines should have been stated to avoid misrepresentation of what might drop from the bench, either through mistake or intention.” (Impey, *ubi supra*.) He goes on to say, “the Court has

“there is scarce any act of government, however necessary or expedient, which, if it tends to control the actions, or to thwart the interests, of individuals, may not expose the members of the Council to actions in the Supreme Court; we even doubt whether we are authorised to prevent any person from quitting the provinces and going up the country, though we should be certain of their intention to enter into the service of a foreign power. In these circumstances, many useful and obvious regulations, for the benefit of the country must necessarily be left unattended. <sup>1</sup> A general recoinage has been repeatedly recommended to us by the Court of Directors: such a measure is, without doubt, indispensably necessary; but it is of a nature too delicate and important, and likely to be attended with too many difficulties in the execution, to be undertaken with safety by a divided government, with a hostile Court of Judicature. We could point out a number of other objects which would deserve our attention, and of abuse, which call upon us for redress; but this is not a season for a mere majority of a council to undertake any measure for the public service, in which the learned in the laws of England can discover anything to cavil at. <sup>2</sup> While a standard is publicly hoisted against our

“always sent to the Governor-General in Council copies of all judgments by which their powers or interests, or those of the Company, were affected or in which they were alluded to.”

<sup>1</sup> “What can the Court possibly have to do with the coinage?” (Impey, *ubi supra*.)

<sup>2</sup> “Whatever want of authority the gentlemen may complain of, or whatever the effects of Mr. Hastings’s conduct are to disarm them of their powers, it must be understood that our cause is totally disconnected with his. The Company and the nation must decide between them and Mr. Hastings. I can answer the declamatory part of this period (in which the run of the sentence has been evidently

“authority, and every individual in the country invited to repair to it; while protection is given to every man who denies or resists the authority of government; and while the Governor-General takes a willing and decided part in every measure that tends to degrade the Council and disarm us of our lawful powers, we are not sanguine enough to expect that any efforts of ours should be equal to the execution of the trusts reposed in us. We cannot answer for the collection of the revenues, we cannot answer for the internal government of the country, nor for the safety of the State; our utmost efforts shall still be exerted to preserve the peace, and to promote the welfare of the country, until the necessity or the expediency of a new arrangement shall be determined at home: but divested as we are of all power, we owe it to our safety and character to discharge ourselves in the most solemn manner of all responsibility.”

This minute is extremely curious. In the first place its vehemence is wholly unjustified by the points to which it refers. At the time when it was written, and down to the end of 1775, the questions, exclusive of Nuncomar's case, and the case of Commaul O Dien, which had arisen between the Court and the Council, were, so far as appears by the papers annexed to Touchet's petition, these, and no others:

<sup>1</sup>The suspension of the various Calcutta Courts.

“more attended to than the truth of the facts) that the Court is open to the suitors, none are invited, but all may fly for justice. That but two persons have applied for protection of the Court in any case in which the authority of Government can on any pretence be asserted to have been called in question. To Mr. Stewart that protection was denied. To Commaul O Dien it has been granted, and I hope your lordship will think on just principles” (*Impey, ubi supra*).

<sup>1</sup> No. 28, encl. 1, April 11th, 1775.

<sup>1</sup> A zemindar, one Choit Sing, had been sued in the High Court because, as his antagonist alleged, he was employed by the Company as a collector of revenue.

<sup>2</sup> The revenue debtors of Hurry Kishen Tagore had claimed a right to be sued in the Supreme Court only.

As to the suspension of the Calcutta Courts, it seems to have been considered by all the parties concerned as a necessary consequence of the establishment of the Supreme Court, and of the local original jurisdiction conferred upon it.

As to the suits against one zemindar, and the refusal of the revenue debtors of the other to be sued elsewhere than in the Supreme Court, no case appears to have been brought before, or decided by, the Supreme Court on the subject.

Besides these there were the cases of the mandamus applied for and refused, and the action for salary. As to this, Impey says that it turned on the question whether the dismissal of the plaintiff was in accordance with the instructions of the Company, and that "the Court have already declared that they will not try whether the cause of dismissal is good or not, the Court will never permit the power of the Governor-General and Council to dismiss to be discussed before them." There was also a case not decided at the time of the minute about the power of the Council to send to England one Pavasey, a European foreigner.

It is clear, therefore, that the only cases of real importance which drew forth this passionate disclaimer of responsibility for the government of the country were those of Nuncomar and Commaul O Dien.

In the second place, the spirit which the minute shows

<sup>1</sup> Encl. 7, April 21st, 1775.

<sup>2</sup> Encl. 6, April 28th.

is in itself remarkable. The thought which throws the majority into despair is that "according to the doctrines maintained by the judges," there is scarce any act of "government, however necessary or expedient, which, if it tends to control the actions or thwart the interests of individuals, may not expose the members of the Council to actions in the Supreme Court." This is a direct claim of arbitrary power. That the holders of the executive authority, however highly placed, shall be liable to actions in an independent court of law, if they control the actions, or thwart the interests of individuals without express legal warrant, and merely because they consider it "necessary or expedient," is a cardinal doctrine of English law, and is the most practically important element of what we call freedom.

It is also important to remark that the Council seem to draw no distinction at all between judgments given by the Court and applications made to the Court. The apparently simple proposition that a Court of Justice cannot refuse to hear and determine applications made to it, and that the judges have no discretion at all as to the causes which may be brought before it, was overlooked by the Council, and has been overlooked by many writers of later times. Up to the time when the Council repudiated responsibility for the government of the country, the Court had given no judgment, except one in favour of the Council, and one (in Commaul O Dien's case) against what they regarded as their rights, and they were blamed by the Council in each case, not for their judgments which they gave, but for their exercise of their jurisdiction.

This is just one of those simple distinctions which excited partisans continually overlook.

Having thus shown how the quarrel between the Court and the Council began, and the relation of the two parties to each other, I shall proceed to sketch its progress.

There were three distinct matters which came into question at various times between the Court and its enemies.

The first was the dispute between the Court and the Council as to the extent of the jurisdiction of the Court over the local Councils, the members of which then represented what would now be called the District Officers, both in the judicial and in the revenue branches.

The second concerned the jurisdiction which the Court, was charged with claiming over zemindars as such.

The third concerned the jurisdiction of the Court over the town of Calcutta, and this was a question not between the Court and the Council, but between the Court and the European inhabitants of Bengal in general but in particular of Calcutta.

With respect to the first and second branches of the quarrel, a preliminary observation must be made, which applies equally to each. The procedure in the mofussil in cases before the Supreme Court was the ordinary English procedure in civil actions at common law slightly modified, that is to say, a writ was issued and served, and if the defendant did not thereupon put in bail to answer the action he was liable to be arrested, as the phrase was, "on mesne process," and imprisoned till his case was heard, which might be for many months. The only modification introduced into this by the rules of the Supreme Court was that an affidavit as to the fact which was said to make the defendant liable to the jurisdiction of the Court was required of the plaintiff, and the writ was not issued until by this means a *prima facie* case had

been made out for its issue to the satisfaction of one of the judges of the Court.

This law of arrest on <sup>1</sup>mesne process was beyond all question one of the worst and most oppressive points of the law of England as it stood, down almost to our own times. Its introduction into India was indefensible.

The effect of it was that on an affidavit sworn behind his back, a man might be arrested at Dacca, for instance, or Patna, and brought to Calcutta, there to be imprisoned at a distance of many hundred miles from his home, unless he could give bail for an action perhaps unjustly brought against him. Even if he pleaded to the jurisdiction, and his plea was allowed, he was put to much inconvenience, and, at all events, he had to employ at a great expense English attorneys and counsel.

The existence of such a grievance as this is sufficient to account for a great amount of censure being thrown upon the persons in whose name and by whose authority the system was administered. When a person is wrongfully arrested and imprisoned he does not usually describe with justice the proceedings of the wrongdoer. Every illegal touch becomes a brutal aggravated assault inflicted with a malicious pleasure in the triumph of might over right. Every prison becomes a loathsome dungeon. In nearly every account of the matters in question it is stated that the prisoners were "dragged down to Calcutta," whereas, in fact, they seem to have been generally taken in boats.

Another topic of prejudice introduced into this subject is the brutality of the bailiffs. But I shall say more on this subject hereafter.

<sup>1</sup> The last vestiges of arrest on mesne process were not abolished till 1869 (see 32 & 33 Vic. c. 62, s. 6).

Upon the whole, I think it clear that the arrest on mesne process was a serious grievance.

Who, then, is to blame for its introduction into India ? The answer is, the authors of the Charter in which the whole process is set out <sup>1</sup> in full detail. I think Impey must have been the draftsman of the Charter, but it was settled by Lord Bathurst, Thurlow, Wedderburn, and others, and the blame to be attributed to them is that they shared the common opinion of their time as to English law ; that they erroneously regarded it as good for England, and made the further mistake of supposing that, being good for England, it was presumably good for India also. <sup>2</sup> The Charter empowers the Court to frame rules of practice, and some blame is due to the Court for not having framed rules which would have prevented these abuses.

Passing from these topics of prejudice to the legal merits of the dispute between the Court and the Council, the points which I have distinguished must be separately considered.

✓ The first matter in dispute was whether the Supreme Court was entitled to interfere with the Company's servants in their judicial capacity, and more especially in their capacity of collectors of the revenue.

The law upon the subject was contained in <sup>3</sup> two sections of the Regulating Act, the material parts of which were as follows :

Section 7 thus defines the powers of the Governor-General in Council : "The whole civil and military government of the said Presidency, and also the ordering, management, and government of all the territorial

<sup>1</sup> Morley's *Digest*, ii. 560, 561, clause xv. of the Charter.

<sup>2</sup> *Ibid.* v. 586, 587, clause xxxviii.

<sup>3</sup> 13 Geo. III. c. 63, ss. 7 and 14.



“acquisitions and revenues of the kingdoms of Bengal, Behar, and Orissa shall be and hereby are . . . . . vested in the said Governor-General and Council . . . . . in like manner to all intents and purposes whatever as the same now are or at any time heretofore might have been exercised by the President and Council or Select Committee in the said kingdoms.”

Section 14 defines the extent of the jurisdiction of the Supreme Court : “The Supreme Court of Judicature thereby (*i.e.* by the Charter) to be established shall have full power and authority to hear and determine all complaints against any of His Majesty’s subjects for any crimes, misdemeanours, or oppressions committed or to be committed ; and also to entertain, hear, and determine any suits or actions whatsoever against any of His Majesty’s subjects in Bengal, Behar, and Orissa, and any suit, action, or complaint against any person who shall at the time when such debt or cause of action or complaint shall have arisen have been employed by or shall have been directly or indirectly in the service of the said united Company, or of any of His Majesty’s subjects.”

The constructions put upon these sections by the Council and the Court respectively, so far as concerns the position of the officers concerned in the collection of the revenues, were as follows :

Both parties agreed that the 7th section conferred upon the Council the “ordering, management, and government” of the revenue. That is to say, it was agreed that they alone had the right to take all the proceedings necessary for the collection of the revenue against the different persons by whom it was to be paid ; but there the agreement ended.

The Council maintained that their officers were exempt from the jurisdiction of the Court in respect of any acts done by them in connection with the collection of the revenue.

The Court, on the other hand, maintained that it was their duty to entertain actions brought against the officers for any irregular or oppressive acts with which they might be charged in the execution of their duty, and that it was one of the principal objects of the Regulating Act that such actions should be freely brought against such officers for such acts.

Two of the judges, Lemaistre and Hyde, were, according to Impey, restrained by himself and Chambers with the greatest difficulty from going to the length of saying that the Regulating Act had transferred all judicial power from the revenue authorities to the Supreme Court. This last-mentioned view was, to my mind, not only practically absurd, but was inconsistent with the concluding words of section 7, which say in substance that the Governor-General and Council were to have the same powers as their predecessors. On the other hand, I think that the view finally asserted and acted upon by the Supreme Court, though in practice it turned out to be inconvenient, expressed the intention of the Act, and was in accordance with its policy, which was to protect the natives from oppression; but it was notorious that the principal oppressions to which they were subject were inflicted in connection with the collection of the land revenue. The view of the statute taken by the Council would have rendered the Supreme Court powerless to interfere if a Provincial Council had extorted by torture sums alleged to be due as arrears of revenue. The proposal of the majority to resist the orders of the Court to set Commaul

O Dien at liberty on bail by *habeas corpus*, was caused by the denial of the Court of the right of the Council to commit him to prison arbitrarily without bail, for an arrear which he disputed, and under circumstances which raised a strong suspicion that the whole proceeding was in bad faith.

The same principles were contended for by the Court and the Council respectively in reference to servants of the Company acting in their ordinary judicial capacity. This has been greatly misunderstood and misrepresented, amongst other writers by James Mill, whose excessive dryness and severity of style produce an impression of accuracy and labour which a study of original authorities does not by any means confirm.

I will now proceed to illustrate these general remarks by a reference to the principal cases in the decision of which they were stated and developed. I will refer to them in the order of time, and will omit those which are not specially characteristic.

<sup>1</sup> The first case to be noticed is one which appears to me to set in a strong light the weak side of the proceedings of all the parties to this famous quarrel. The Provincial Council at Burdwan, of which Mr. Higginson was the chief, dispossessed the Ranee of Burdwan from her position as guardian of the infant Rajah, and kept the Ranee in confinement. Upon this informations were sworn against Higginson before Lemaistre, who, besides issuing a summons against Higginson, wrote him a private letter, which illustrates both the view which the judges of the Supreme Court took of their position, and the silly violence of Lemaistre's character. Why the Ranee was put under restraint does not appear,

<sup>1</sup> Touchet, Gen. App. No. 17.

but the contrast between the view which has been taken of the judges of the Supreme Court as being brutal tyrants whose sole object was to extend their power by nefarious devices and miserable technicalities, and their own view of themselves as the chosen special protectors of the natives, could hardly be set in a stronger light. The letter is as follows :

"SIR—A complaint has been made to me against you "on behalf of the Ranee of Burdwan, which appears to "be of a very serious nature.

"I apprehend that the late Act of Parliament had "particularly in view to protect the natives of this "country from all oppressions committed through "European influence. The Ranee, who appears to be "the widow of one of the most ancient rajahs, and one "of the first families in Bengal, is, it seems, with the Rajah "her infant son, kept in a state of inquietude and duress "by a military force under your orders and directions ; "and a man of the lowest state of the people is, against "her consent, intruded upon her, introduced as a prin- "cipal servant into her family, takes upon himself the "receipts and disbursements of her cash, threatens and "even dismisses her servants at his pleasure, puts them "under the custody of peons, and in every respect acts "contrary to the wishes and inclinations of the Ranee, "who is thereby rendered not only no longer mistress of "her own house, but obliged to take refuge in her most "inward apartments, and prevented (from the fears and "apprehensions she is under) from performing her accus- "tomed religious ceremonies. <sup>1</sup> Even her private apart-

<sup>1</sup> The violation of the zenana is mentioned as a grievance in several cases. Macaulay is virtuously eloquent about it. The impression made on my mind is that it was a kind of pleader's flourish,

“ments (by all Europeans hitherto deemed sacred) are,  
“it seems, not considered by you as an asylum ; and you,  
“it is sworn, have broke through that respect and decorum  
“which, according to the customs and usages of this  
“country, is due to every person of her sex, and peculiarly  
“to a person of such exalted rank.

“I am told (and, indeed, I have seen it in writing) that  
“this is attempted to be justified by orders from Govern-  
“ment. With me it greatly aggravates the offence, since  
“Government is as much under an obligation to be just  
“as the lowest individual ; and more is to be allowed in  
“defence of an individual who, actuated by the sudden  
“impulse of his passions, commits an injury, than to him  
“who is the ready instrument to execute the orders of  
“despotic power, a power which, give me leave to say,  
“the Creator could never mean to delegate to human  
“beings.

“It is sworn to me, that the Ranee is not indebted to  
“the public revenues, except, perhaps, for the current  
“month, and that she is accused for no crime, and that  
“neither your Sepoys nor your tormentor, Bahadur Sing,  
“do claim to act under the process of any Court of  
“Judicature.

“If any respect and regard, therefore, is to be paid to  
“the ancient families of this country ; if the British  
“legislature did mean, by the late Act of Parliament, to  
“protect the natives ; I shall be glad to see by what  
“arguments this Government will attempt to justify,

like the “assaulted and beat,” “broke and entered,” and *alia enormia* of old-fashioned English special pleading. The charges are made as well in the cases where the High Court’s interference was claimed as in those in which it constituted the grievance complained of ; but I shall return to this subject..

“against a person of such high rank as the Ranees of Burdwan, a violation of civil rights which would be deemed detestable, if practised upon the meanest peasant in the mother country.

“Every disturbance of the peaceable enjoyment of a person’s own house is an enormous oppression, and while I stay in this country I will, to the utmost of my power, give the same redress, and the same measure of justice to the lowest of the people, which I hope to see given to the Ranees upon this occasion, be the oppressor ever so great or powerful. A regard for the interests of the East India Company, which might be affected by an arrest of all the members of one of their provincial Councils, prevents me from sending such a warrant as the flagrancy of the case seems to require. Personal respect and regard likewise to yourself induces me to send only a summons, which I hope you will attend to without delay. But the insolent fellow, introduced into the Ranees’s family against her consent, I have sent a constable to apprehend.

“I have summoned likewise the person who commands the Sepoys ; and I hope to hear, upon your arrival at Calcutta, that the Sepoys are withdrawn, and the Ranees left at liberty to do what, and go where, she pleases.”

In this case the judge of the Supreme Court appears in a mischievous and rather ludicrous light. His letter was arrogant, foolish, and in all ways unjustifiable, but he was acting so far as the issue of the summons went well within his legal rights. Higginson was unquestionably liable to the process, both civil and criminal, of the Supreme Court, and if he did illegally imprison the Ranees was intended by those who drew the Act to be subject to such process.

The next <sup>1</sup> case to be noticed shows that there were grievous scandals to be remedied amongst the provincial Councils, and that their complaints of the interference of the Court were much more natural than justifiable. This is the case of Seroop Chund's *habeas corpus*. Seroop Chund was a malzamin or surety for the payment of revenue, and also kazanchi or treasurer to the Dacca Council. In the first capacity he was reponsible for a balance of Rs. 10,000. In the second he was liable for a balance of Rs. 66,745, with reference to which he acted as a sort of banker. In respect of the balance of revenue peons had, according to the phrase then used, been "put upon him," making him a prisoner at large. There was some dispute about this, in the course of which he was asked about his balance as treasurer, and it appeared on examination that he was unable to pay it over in cash to the Company's diwan at once, because he had lent a considerable part of it to various servants of the Company, in particular Rs. 10,000 to Mr. Shakspeare, one of the members of the Dacca Council. <sup>2</sup> This, I think, appears from his examination, though he in terms denied that the money lent was the Company's. The Board thereupon ordered him into confinement, Shakspeare, his debtor, being one of the Council which made the order. Shakspeare denied the debt which Seroop Chund alleged, but admitted that there was some transaction between them, that Seroop Chund had claimed the sum of him, and that he, Shakspeare, had referred Seroop Chund to the Supreme Court.

Seroop Chund got a rule from the Supreme Court calling on the Council to show cause why a *habeas corpus* should not be issued to liberate him. The Company's

<sup>1</sup> Touchet, Gen. App. Nos. 6-9.

<sup>2</sup> No. 6.

attorney, to whom the matter was referred, as appears by <sup>1</sup> his letter to the Governor-General and Council, showed the judge (Hyde), "such part of the proceedings as I thought were proper for him to see. I did not choose to show him that part of the proceedings where the Board resolve to confine him for the balance remaining due to the Company as kazanchi or banker, it not being clear to me that they are authorised to do that, I could have wished that the ostensible reason for the confinement should be on account of the Rs. 10,000 due for the revenue." In other words, he kept back the truth and wished the Company's servants to give a false account of the reasons of their conduct.

In an elaborate judgment on the case, which, however, ended only in allowing Seroop Chund to give bail, Le Maistre re-stated the principles stated by Impey in the case of Commaul. As regarded the debt due from Seroop Chund as kazanchi, he pointed out that the matter in dispute was a matter of contract as to which the Council ought not to be judges in their own cause, and ought not to enforce what they regarded as being their rights by the arbitrary imprisonment of their debtor. There is a remark in this part of the judgment that a man "might as well say that he was commanded by the King of the Fairies" as by the chief and provincial Council of Dacca, because that body was not a corporation known to the law. This James Mill censures. There is a clumsy attempt at playfulness about it, no doubt, but the meaning appears to me clear and good sense. It is that when a person asserts a right to imprison another he must claim it either in his own name, or by some corporate or official name recognised by the law. That the

<sup>1</sup> August 31st, 1777, enclosed in No. 6.



Provincial Councils had no definite character or position known to English law was an unquestionable truth. It was one illustration of what at that time was perhaps the principal difficulty in carrying out any consistent scheme of government in India, that no one except the Governor-General and Council and the Supreme Court, had any defined legal rights or position, and that it was impossible to say that the Government had any legislative power or any sort of effective substitute for it. It would have been easy for the Supreme Court, had they really been factiously disposed, to have justified and acted upon the doctrine that no other court of justice except themselves existed in Bengal, Behar, or Orissa, and that the law of England was introduced into the whole country and not simply to a certain extent into Calcutta. Such a conclusion would, of course, have been in practice a monstrous and intolerable absurdity, but if Impey and his brethren had been mere professional pedants, incapable of looking beyond the words of the Regulating Act, they might have found plausible technical grounds for asserting that such was the true interpretation of the Act.

Before going on to the next case to be mentioned, I may refer shortly to <sup>1</sup>two remarkable papers which appear in the General Appendix to the report of Touchet's Committee.

The first in order of date is the report of Mr. Bogle, the Commissioner of Lawsuits, who reported to the Calcutta Board of Revenue the observations which he had been led to make, upon an action for false imprisonment,

<sup>1</sup> No. 29, March 7th, 1779, Report of Bogle, the Commissioner of Lawsuits; No. 21, minute by Mr. Shore (afterwards Lord Teignmouth), March 26th, 1779.

against the Committee by a farmer whom they had imprisoned for an arrear of revenue. The defence was that the plaintiff was security for the revenue which was in arrear, and this the Committee had to prove. When they tried to prove the arrear they found it practically impossible to comply with the requisitions of the English law of evidence, which did not accept their accounts as evidence of the matters alleged in them. The letter is too long to quote, but the effect of it is that "as the common and statute law of England has been formed and modelled to the situation and manners, not of this distant and conquered province, but of a free and independent people," the Revenue Councils are put at a great disadvantage when actions are brought against them. They had been accustomed to act in the unfettered way in which native authorities had acted, and when called upon to justify their conduct according to the law of England, found it practically impossible to do so.

A few days after the date of Mr. Bogle's report, Mr. Shore (afterwards Lord Teignmouth) recorded a minute to much the same effect. He was called upon to accept the charge of the Adalat, and begged to be excused, because of his fear of "vexatious prosecutions" in the Supreme Court. He thus describes the situation of the judge of an adalat: "The more effectually he performs his duty, the more he maintains the dignity of his office and enforces his decisions, the more he is liable to prosecution. If, in procuring the attendance of witnesses, he should exercise any compulsory powers, if, to restrain trivial and groundless complaints and to detect chicane and intrigue he should put in practice the discretionary powers with which he is invested by the public regulations of imposing a moderate

“fine, or <sup>1</sup>inflicting a mild corporal punishment, he may “become subject to a suit which may terminate in his “ruin.” . . . “The mode of transacting business in “this country is so fundamentally different from that “which prevails in England, and so contrary to the letter “and form of English laws, that scarce any transaction “tried by their standards will admit of a justification.”

The Governor-General and Council, however, called upon Mr. Shore to take up the duties which so much alarmed him, observing, “we are not acquainted with any “instance which might serve as a foundation for the apprehensions expressed by Mr. Shore.” They did not like any one, except themselves, to take up their tone of complaint.

<sup>2</sup> Early in 1779 the hands of the Governor-General in Council were strengthened by the appointment of an advocate-general, Sir John Day, who was to advise them in legal matters. He was called upon to advise in a case which had a singular result, and established an important principle. This was the case of *Dutt v. Hosea*. Mr. Hosea was the head of the Diwani Adalat at Moorshedabad, and was sued for alleged irregularities in the procedure followed against Gora Chund Dutt. The Advocate-General thought he had been extremely irregular. In a rather pretentious paper Day gave it as his opinion that, though methods of procedure “not a little repugnant to “those ideas of distributive justice that are familiar to “the minds of Englishmen,” might be reasonable in India, still, the line must be drawn somewhere, and Hosea and his colleagues had gone beyond it. What shocked him so much was as follows :

A sued B. B counterclaimed for a much larger sum,

<sup>1</sup> Does this include flogging ?

<sup>2</sup> Touchet, Gen. App. No. 4.

whereupon, shocking to relate, B was not only absolved from A's demand, but got judgment against A for a much larger sum than A had originally claimed from B. On this Day remarks: "Thus far the irregularity of their proceeding upon the hearing which, upon the ground of common sense and expediency, might perhaps admit of a defence" (not, such seems to be the suggestion, that that made much difference) "had it not been aggravated by the singular and multifarious means of satisfying the judgment to which they have resorted." They not only gave execution against body and goods, but they even attached A's outstanding debts to satisfy B's claim, and examined his books, and, in short, conducted themselves in all respects as if by the spirit of prophecy they had known the provisions which about 100 years afterwards were to be inserted into the English Judicature Acts and the rules in force under them. Upon this view of the matter the Advocate-General earnestly recommended a compromise, as he felt sure that the Moorsheadabad Council must lose their cause. The Governor-General in Council, however, refused to take this advice. They said that "this was the first instance in which the member of any Diwani court had been sued as individuals in the Supreme Court for acts done in their judicial characters," that to compromise the suit would weaken the authority of the courts, and that "the suit ought to take its course for the purpose of ascertaining by a legal decision whether the Diwani courts are or are not competent in their judicial powers upon the principles of their own constitution." The Advocate-General reiterated his opinion at great length, and with much earnestness. The Council were firm, and the case went to trial. The result was that

judgment was given in favour of the defendants. "The chief justice said "that in case of suits instituted before "the Provincial Councils, except in cases of manifest "corruption, the Court will not enter into the regularity "of the proceedings." He further said, "I do not think "it is the province of this Court to enter into the irregularity of the Court's proceedings."

This decision must, I should think, have pleased every one except Sir John Day. It clearly established the principle that the Provincial Councils were Courts of Justice, and that nothing would render their members individually liable to actions for acts judicially done, short of "manifest corruption." Their irregularity, if it existed, would only be a cause for appeal. It is of importance to bear this decision in mind in reference to subsequent transactions, and especially to the Patna case, which was ignorantly supposed to be at variance with it.

One or two significant incidents and expressions occurring in the papers in the general appendix may be here mentioned.

<sup>1</sup> In October, 1779, the Dacca Council were greatly disturbed in their minds by the appearance amongst them of John Doe, who was then still in his prime. One Chundermonee demised to John Doe and his assigns certain lands "in the Purgunnah Bullera and province "of Bengal for a term of seven years, whereupon Henry "Robinson" (more generally known in England as Richard Roe, but he and Doe had many aliases) "put "out and removed the said John Doe from his possession, "but John Doe recovered his time (? term), yet to come "of and into" the said lands, whereupon George III. by the Grace of God, of Great Britain, France, and Ireland.

<sup>1</sup> Touchet, Gen. App. No. 14.

King, Defender of the Faith, and so forth, commanded the Sheriff of Calcutta to give John Doe possession. At this Mr. Shakspeare burst into fury, and, in language which must have surprised John Doe, proposed "that a sezawul be appointed for the collections of Patparrah Talook, with directions to pay the same into the Bullera cutcherry."

There is something grotesque in the confrontation of John Doe with sezawuls and cutcherries, but the plain English of the whole story was simply that lands of which the Sheriff of Calcutta gave possession to a successful plaintiff were put by the Provincial Council under the charge of a receiver who accounted to them for the proceeds. This was not only a denial of the jurisdiction of the High Court, but an actual interference with its process.

The difficulties of the introduction of English law into India are illustrated by the following passage in <sup>1</sup> a representation addressed to the khalsa or native exchequer, by the diwan for the zemindarry of Burdwan: "The inhabitants of the interior country of Bengal are totally unacquainted with the forms and customs of the English law, with the language and phrases of the English lawyers, and with the offices of sheriff and other officers who are all English. When compulsion is offered to any person in the Mofussil, they threaten with *habeas corpus* and damages, but what an *habeas corpus* is, what are damages, what warrants, what summonses, no one of them can tell." He afterwards remarks quite simply, "It is a custom in Bengal, whenever the farmers, <sup>2</sup> yetmaundars, and currumcherries

<sup>1</sup> No. 26.

<sup>2</sup> "IHTIMAM (corruptly eahtimam, yetmaum, yetmaunee), care, superintendence, trust, responsibility. *Ihtimamdar* (yetmaundar), the holder of a trust, the person charged with the realisation of a stipulated

“have failed in discharging their revenue to exercise “severities upon and enforce payment from them.” This shows that one of the matters really at issue was the power of the local authorities to “exercise severities” for the extortion of the revenue. The Supreme Court was in fact the representative of ill-instructed English philanthropy, which was checked in its career only by the force of misrepresentations against its agent.

I pause here for a moment to give in a few words the effect of the decisions actually given by the judges of the Supreme Court up to 1779, so far as appears from the report of Touchet's Committee, upon the question of the position and authority of the Company's servants who occupied judicial positions, especially in connection with the collection of the revenue, the most important of whom were the members of the Provincial Councils. It was this: The Courts established by the Company were recognised as courts of justice, the judges of which were not liable to actions for their judicial proceedings, even if they were irregular, unless they were corrupt. It had also been held that they had a right to hold revenue debtors to bail for revenue debts, and to confine them by putting peons on them or in prison until bail was given to appear before the Diwani Court, but that they had no right to imprison them without bail, in order to secure the payment of what might ultimately be found to be due. In other words, the Supreme Court did not allow the Revenue Courts to imprison a man without bail on mesne process. As far “revenue for a certain district; also an agent or deputy of the zemindar “appointed by him to realise the revenue of any portion of the zemindari. A currumcherry (kharamchári) is an officer appointed by a “zemindar or payer of revenue to collect the revenues and arrange the “affairs of a village; a factor, a steward” (Wilson).

as I can discover, this was all that had been done in the course of the first four years of the Court's existence, though much jealousy, much apprehension, and much bad feeling had been aroused. The differences between the Court and the Council, however, culminated in several proceedings, of each of which an account will be given in one of the following chapters.



## CHAPTER XII.

### THE PATNA CAUSE.

THE suit called the Patna Cause was the subject of the second article of impeachment against Impey, and amongst his enemies in India it excited a feeling against him nearly as strong as the charge relating to Nuncomar, though it was not even suggested that he had any sort of personal or party interest in the matter.

The Report of Touchet's Committee contains an account of it, abridged from a mass of papers printed in what is called the Patna Appendix to the Report. They are voluminous, and relate to an action brought in the Supreme Court against the native law officers—a Cazi and two Muftis—of the Provincial Council at Patna. The action was tried by Impey, Chambers, and Hyde without a jury. The trial lasted ten days, and Impey delivered the judgment of himself and his brethren in a speech the note of which fills forty-nine large folio pages. Mr. Bogle, the Commissioner of law-suits to the Company, wrote the Governor-General and Council a letter setting forth his view of the matter, which fills twenty-eight or twenty-nine such pages, and it appears from references made in these two documents that at

least fifty-five depositions of witnesses were made, and that a very large number of documents were exhibited on the occasion ; but neither the depositions nor the documents are set out at length, so that, voluminous as the papers are, they are essentially incomplete. I have carefully gone through the whole of the appendix. I will give only such an outline of the facts as is necessary to make the general nature of the case intelligible, and to show what light it throws upon the administration of justice in India outside the Presidency towns in the time of Warren Hastings.

The Patna Cause was an action brought in the Supreme Court by Naderah Begum against Behader Beg, Cazi Sahdee, Mufti Barrack-toolah, and Mufti Gholam Muckdoom. The plaint was for assault, battery, and imprisonment said to have extended over the period between the 31st of January and 1st August 1777, also for breaking and entering the plaintiff's house and carrying off her property to the value of R.600,000. Behader Beg pleaded to the jurisdiction, but on this plea judgment was given against him. All the defendants pleaded not guilty, and they also gave notice of facts of which they proposed to give evidence in justification of what they had done. Behader Beg's proposed justification was, in substance, that in the matters complained of he acted only as a suitor, and the other three defendants said that they acted only as ministers and officers of a court of justice.

The facts out of which the action arose were these :—

Shabaz Beg Khan was a native of Cabul who came into India to seek his fortune as a soldier. He became very rich, settled at Patna, married late in life Naderah Begum, the plaintiff, and had no other wife. He died

on the 10th December, 1776, "leaving very great property behind him, and his widow in possession of it." Some time before his death he brought up from Cabul a nephew, Behader Beg, the son of his brother. And it was stated, though not proved, that he had expressed his intention to make this man his heir. There was also living in his house another nephew, Cojah Zekereah, the son of one of his sisters.

On the death of Shabaz Beg Khan, his widow, Naderah Begum, remained in possession of his property, but Behader Beg, within three weeks of his death, presented a petition to the Patna Council endorsed by their officer "2nd January, 1777."

The petition said that the petitioner was the adopted son of the deceased, that the widow had embezzled some of the deceased's goods, and prayed that guards might be set to protect the property, and that the Council would order the Cazi to ascertain the petitioner's right, "and give information to the Presence" (*i.e.* to the Council) "that your petitioner may obtain his right." It made no definite, distinct claim. The Council <sup>2</sup>thereupon issued an order to the Cazi and Muftis to take an inventory of the property, secure it until the time of the decision and division, and to transmit to the Council a written report "according to ascertained facts and legal justice."

<sup>1</sup> So says Impey in his judgment. Mr. Bogle says it was in November.

<sup>2</sup> Their order or *perwanah* obviously refers to the petition, but is dated (in the copy set out in Mr. Bogle's letter) in this singular way: "Written the 2nd January, 1777, English style [then follows the native date], Patna, 2 December, 1777, Simeon Droz." This is obviously wrong, as all the proceedings were between January 31st and June, 1777. On the other hand, 2nd December, 1776, cannot be meant, for the petition must have preceded the order upon it.

It is a remarkable proof of the looseness with which business of this kind was then conducted, that this proceeding seems to have been entirely *ex parte* and without notice to the widow or any one on her behalf.

The Cazi and the Muftis went to the house, and after a great deal of difficulty and some dispute as to the appointment of Cojah Zekereah as attorney for the widow (an appointment alleged by the defendants and denied by the plaintiff to have been duly made), got into the house and locked it up and sealed some of the doors. A few days after they returned and made an inventory of the property. It was said that on this occasion they behaved very roughly, compelling the plaintiff by threats of force to leave one room after another, until at last she took refuge in a filthy outhouse open to a common bazaar. After undergoing, as was said, some other indignities, she retired into the 'durgah of Shah Azum, which was inhabited by Fakeers, who gave her hospitality. A guard was set upon her by the Council at Patna<sup>2</sup> "to intimidate her to give up the slave-women, "papers, and seal of the deceased." She remained at this place under restraint for about three months. At first the guards would not even allow the Fakeers to give her food,

<sup>1</sup> "DARGAR-DURGAH—a royal court. In India it is more usually applied "to a Mohammedan shrine or the tomb of some reputed holy person, and "the object of worship and pilgrimage" (Wilson).

<sup>2</sup> Letter of Mr. Law to Hastings. Patna, App. 6. Mr. Law says:— "We are cautious of incurring censure by acts of violence, however "sanctified by the opinion of the Mussulman law-officers. Necessary "coercive measures of Government easily acquire the name of oppression ; "and should the passions of the woman urge her to any act of despera- "tion " [he was obviously afraid she would kill herself], "the effect and "not the cause would be principally considered, and the bloody scene "painted with a thousand exaggerations by the prejudices of the "natives."

and they did so secretly; but the strictness of the guard was afterwards somewhat relaxed.

In the meanwhile (the exact date does not appear) the Cazi and Muftis held an inquiry, and sent in a <sup>1</sup> report which must have been delivered before January 20th, 1777, because on that day an <sup>2</sup> order upon it was signed by Mr. Droz, one of the Patna Council.

The report begins: "The Cazi and Muftis now deliver "in the following report, on the right of inheritance claimed "by the widow and nephew of Shabaz Beg Khan, in "his estate and other property." And they described themselves as having been "appointed in an inquiry relative "to the right of inheritance claimed respectively by the "widow and nephew." This was certainly not the fact; they had been appointed only to take an inventory of and lock up goods under seal, and report to the Council, which was an entirely different thing.

The report states for the first time the nature of the dispute. It says that the defendant, Behader Beg, claimed the property as the adopted son of Shabaz Beg. That the widow claimed under a will and deed of gift made by the deceased. And that the will and deed of gift were both forged. It then recommends that the property, "exclusive of the <sup>3</sup> Altamghá which does not form part of "the inheritance" should be divided into four shares, of which three should go to Behader Beg, "his father being "the legal heir of the deceased and himself the adopted "son," and the fourth to the widow.

<sup>1</sup> Patna, App. No. 2.

<sup>2</sup> Exhibit, printed in Boyle's letter, Patna, App. No. 18.

<sup>3</sup> "ALTAMGHÁ (from the Turkish *al red* and *tamghá*, a stamp or impression), a royal grant under the seal of some of the former native princes of Hindostan, and recognised by the British Government as conferring a title to rent free land in perpetuity, hereditary and transferable" (Wilson).

Upon this the Court at Patna ordered the Cazi and Muftis to divide the inheritance according to the report, but in favour of the widow they ordered that Behader Beg should pay her a quarter of the income of the Altamgha lands, which had been reported by the Cazi and Muftis as excluded from the inheritance.

Some sort of division was accordingly made, and it seems that Cojah Zekereah was told that he could take the part allotted to Naderah Begum. He refused to do so. There was much controversy, into which it is needless to enter, as to the circumstances of this division, and as to Cojah Zekereah's proceedings in relation to it. The only point worth noticing as to this part of the case is that very early in the proceedings Cojah Zekereah was arrested for the forgery of one or both of the documents produced by him.

The result of the whole matter was that Naderah Begum was expelled from the house in which she was living, treated with considerable indignity, deprived of the possession of the whole of the property which had belonged to her husband, and declared to be entitled to one-fourth of it only, the deeds on which she claimed the whole being alleged to be forged. These were the wrongs for which she brought her action.

The first point which arose was as to the Court's jurisdiction over Behader Beg. <sup>1</sup> Evidence was given which, as the whole Court considered, showed that he was the <sup>2</sup> farmer of the revenue of certain villages in Behar.

<sup>1</sup> Patna, App. Nos. 8, 9, 10.

<sup>2</sup> "By the word 'farmer' in the Hindostan language is meant *Izardar*," Patna, App. No. 8. "*IJARA*, corruptly *Izara*, &c., price, profit, especially employed to denote a lease or farm of land, held at a defined rent or revenue, whether from Government direct or from an intermediate payer of the public revenue. *Ijaradar*, a farmer of any item of public revenue,

Possibly they ought to have regarded him only as security for the actual farmer. However that may be, regarding him as farmer, they all held that he was "a subject of the jurisdiction of the Court, as being directly or indirectly in the service of the East India Company." Impey put his view of the matter broadly and plainly thus: "The person authorised by Government to collect the revenues of Government, whether he is employed by the name of 'collector' who is answerable to Government for the sum he receives over and above the stipulated sum he is ordered to raise, and receives a monthly salary as a compensation for his trouble; or by the name of 'farmer' who rents the revenues for a stipulated price which he is to pay to Government . . . is, within the Act of Parliament and the Charter, a subject of the jurisdiction of the Court, as being a person employed by, or directly or indirectly in the service of, the East India Company; and, if this be not the case, by simply changing the name of the officer and paying for his trouble in a different mode, every salutary provision of the Act of Parliament intended to remedy oppression and extortions in the collecting of the revenue would be evaded." He added, "I now declare, what I have frequently declared from this place, that oppressions and extortions represented in England to have been exercised by the officers of the collections, whether truly or falsely, were, as I have ever understood, one principal reason for the establishment of this Court."

Chambers, though he agreed with Impey in the main and as to the particular case, pointed out that a mere whether from land customs or any other source; the renter of a village or estate at a stipulated rate" (Wilson).

zemindar, the holder of land subject to the payment of revenue, was in a different position from a farmer, and that a farmer who represented a zemindar would not be subject to the jurisdiction. To this view Impey expressed his assent. Hyde also agreed.

This was the first case in which the liability of a farmer, as he was then called, to the jurisdiction of the Supreme Court was affirmed. Whatever may be thought of the policy of the statute I do not see any answer to Impey's argument as to its meaning. What persons directly or indirectly in the service of the Company could it have been intended to bring under the provisions of the Regulating Act, as to the Supreme Court if those who were employed in the collection of the revenue were not to be so included ?

The next point to be noticed is as to the justification set up by the defendants for their conduct. Substantially <sup>1</sup>Behader Beg's justification was that he was only a litigant, that the other defendants were officers of justice, and that all he did was to take what they gave him. His justification therefore depended upon theirs.

The substance of the <sup>2</sup>justification of the Cazi and Muftis must be stated a little more fully.

Put simply, and divested of surplusage, it came to this, that the Provincial Councils were courts of justice before the Regulating Act ; and that also before the Regulating Act they were attended by cazis and muftis to whom suits between Mohammedans used to be referred ; that upon such reference the cazis and muftis used to hear the parties, or their vakeels, and the evidence on both sides, and to make a report to the Court, whereupon the Court made a decree, subject to an appeal to the President and

<sup>1</sup> Patna, App. No. 12.

<sup>2</sup> Patna, App. No. 18.



Council. This arrangement had been known to and sanctioned by the Governor-General in Council, who had under the Regulating Act the powers necessary for that purpose. The cause in question was a cause between Moham-medans. It had been referred to the defendants as cazi and muftis. All the acts complained of were acts done by them as such cazi and muftis in the discharge of their duty.

These notices of justification were notices of the facts which the party who gave them meant to prove by way of justifying his conduct. This was an advantage to the parties, because if the Court was of opinion that the facts alleged would, if proved, constitute a justification, the effect of this would be, in many cases, to put a summary end to the action, because, if the facts relied on were notoriously capable of being proved, and were pronounced by the Court to amount to a justification if proved, there would be no use in incurring the expense of proving them. On the other hand, if the Court thought that the facts stated would not, even if proved, amount to a justification, the parties would be saved from the expense and trouble of proving their case.

Upon the notice of justification given by the Cazi and the Muftis, eight objections were made. Of these Impey considered that seven ought to be overruled; but, as the other members of the Court were not prepared to agree with him, the result was that on these points the Court delivered no judgment. It was the unanimous opinion of all the judges that the eighth objection was fatal to the right of the defendants to give in evidence the facts on which they relied, because, if true, they would form no justification of the conduct which they were alleged by the plaintiff to have pursued.

The eighth objection was in these words:—

“ That it appears on the face of the notice that the proceedings were illegal. It is set forth that the President and Council had nominated and appointed certain members to sit as a court, and to hear and determine actions and suits; but it is stated not that they heard the action and suit in the present instance, but that they referred it to the Cazi and Muftis, who in fact tried the cause and delivered in a report to the Court, who thereupon gave judgment; and it was evident that these members, possessing only a delegated authority to try causes, could not delegate it to others, because it is an allowed maxim of the law of England ‘*delegatus non potest delegare*.’ ”

The judgment on this matter is too long to quote, but the essence of it may be put in a very few words. It sets in various points of view, and illustrates in different ways, the conclusion which the Court drew from the terms of the notice of justification, which was that the Provincial Council at Patna had become a merely nominal Court, and that it had allowed its native law officers substantially to usurp its jurisdiction, and this, they say, was manifestly and radically illegal. It was as if an English Judge of Assize made over the causes which he ought to try himself to be tried by the Associate, or as if a County Court Judge made over his cases to his Registrar. In this I think they were perfectly right. Of course the Patna Council had every right to make use of the services of their law officers, moreover, though the contrary has been asserted, there is nothing in the judgment to show that the Supreme Court would have disapproved of their being employed, if such were the practice of the Council, in such duties as were discharged by the masters in equity and other officers of

the Supreme Court, and by the masters in chancery and the analogous officers in the Superior Courts of common law in England. What the Supreme Court decided was that the Patna Council had no right to make over to the Cazi and the Muftis the actual decision of the cause itself. So far, I think, it is impossible to deny that they were right. I think, on the other hand, that they might have explained more clearly than they did the limited extent to which their judgment rested on the maxim "delegatus non potest delegare." <sup>1</sup> Maxims of that kind are, in my opinion, seldom useful, and are liable to be misunderstood. In this particular case the reference to the maxim, which was made first by the plaintiff's counsel, Mr. Tilghman, and not by the Court, gave a handle to gross misrepresentations and to much ignorant misunderstanding of the judgment of the Court.

As the defendants said they wished to carry the case to an appeal, the Court allowed them to give evidence of the matters stated in their notice of justification, notwithstanding the interlocutory judgment just referred to. A trial accordingly took place on the whole case, which lasted ten days, and on which Impey delivered a judgment in which Chambers and Hyde seem to have agreed, to which I have already referred.

It is extremely long, but the conclusions at which it arrives may be stated shortly.

In the first place Impey states the grievances of the plaintiff. He then passes to the justification, upon which he observes, first, that, even if it were proved and were good in law, it would not cover the grievances proved, except the taking of the goods. The plaintiff would thus

<sup>1</sup> See some observations of mine on this subject in my *History of the Criminal Law*, vol. ii. p. 94, note.

be entitled to damages for the various personal indignities to which she had been exposed.

In the second place Impey points out that, whatever might be its value in point of law, the justification was not proved in point of fact. There was no evidence given either as to the institution of the Court, as to its constitution, or as to its rules of practice being such as was alleged by the defendants.

As to this, it is to be observed that the plaintiffs appear to have insisted on the application of the strict rules of evidence to the proof of matters (*e.g.* the original institution of the Patna Council, and some other matters), which the defendants expected would be conceded to them. It also appears that for some reason or other the defendants would not produce the proper legal evidence on some of these points, although they had the papers in Court. It would, however, take too long to go fully into these topics.

In the third place, Impey pointed out that there was no proof whatever that the Patna Council had given any previous sanction to the course taken by the Cazi and Muftis. The proof was that when ordered to make the inventory and secure the goods those officers proceeded (after a fashion) to try the cause. It might have been added that there were some vague expressions in the *perwanah* which might bear a wider interpretation.

In the fourth place it was pointed out that, whereas the report which the Cazi and Muftis made, and which was the ground of the order under which the property was said to have been distributed, awarded one-fourth part of the property to the plaintiff, it had never been returned or tendered to her. The plaintiff, therefore, was at all events entitled to recover

the value of that part, together with compensation for the various insults and other <sup>1</sup>ill-usage to which she had been subjected. At this point a further question arose: Was she or not entitled to the value of the rest of the property taken, and was the injury done by the ill-usage to be assessed as for a mere ignorant mistake on the part of the defendants, or as for a wanton, wilfully illegal outrage? These two questions were connected together in this way: the plaintiff clearly was not entitled to recover back what could be shown not to be her property, though, even if the property was not hers, she would be entitled to some small damages for its being taken out of her possession by a mere trespasser, in which light the Cazi and Muftis were regarded. Now if the deeds under which the property was claimed were forgeries, she had no title to the three-quarters of the property awarded to the defendant Behader Beg. Hence it was material to inquire whether the deeds were really forged, as the report of the law officers found, and this finding also affected the damages to be awarded for their conduct, for the examination of their report might show how far they were acting in good faith and how far they were committing an act of wicked and shameful oppression.

To determine these questions Impey's judgment goes at great length into an examination of the report and of the evidence given at the trial in the Supreme Court as to the forgery of the two deeds under which the widow

<sup>1</sup> The Court thought that the imprisonment at the monument was the act not of the defendants but of the Patna Council. The members of it were afterwards sued separately for this and Rs.15,000 damages were given against them. The imprisonment was clearly illegal, and Law's letter to Hastings already quoted shows that he was aware of its illegality.

claimed. The interest of this matter has so completely passed that I have only looked over it cursorily and have not studied it. Impey and the rest of the Court arrived at the conclusion that the deeds were genuine and that the report was "unjust and absurd," some of the most important statements made in it being wilfully false. The following short extract is sufficient on this head: "Had it marks on it only of folly "and ignorance we should lament not only that a "cause of this consequence, but that the vast property "of the inhabitants of the rich and opulent province "of Behar should be subjected to the judgment of "such weak men, but we fear that we shall be obliged "to deplore that it is delivered over to rapine and "violence of wicked, inhuman oppressors." <sup>1</sup> Elsewhere he says, "That widows who from their sex (more especially "if of any rank) have been by <sup>2</sup> black officers attend- "ing these Courts thought proper objects of rapine "and violence we have had before proved to us" and he refers to another case.

Mr. Bogle, in his letter to the Governor-General and

<sup>1</sup> He added this remark, to which a prominent place was given in the article of impeachment against him: "That they should be mean, weak, "ignorant and corrupt, is not surprising when the salary of the principal "judge, the Cazi, does not exceed Rs.100 per month." The remark is rough and harsh. It is also invidious and vulgar in the mouth of a judge whose salary was nearly sixty-seven times as large (£8,000 a year is equal to Rs. 6666 10s. 8p. per calendar month, taking the rupee at 2s.), but in substance it was true. If Impey had said that it was not right that persons intrusted with such extensive powers should be so wretchedly paid, especially in a country where judicial corruption was notoriously common, no one could have objected to what he said.

<sup>2</sup> The expression "black officer" has been censured as rude. I see no more rudeness in calling a man black than in calling him white if the fact is so. Natives often speak of themselves as black; and some natives as "red" or "wheat-coloured."

Council, without exactly controverting Impey, gives his view of the matter and in particular gives many reasons for thinking that the deeds were forged and that the report of the Cazi and Muftis was not only made in good faith but was actually true.

I have not studied the matter enough to give any opinion on the subject. Strong observations arise on both sides. Impey's view of the matter was that the proceedings of Behader Beg was one of gross oppression and plunder of a helpless widow, effected by the false accusations of an innocent man for forgery. The view taken by Mr. Law of the Patna Council in a letter to Hastings was that the struggle was in fact between Zekereah and others on the one side, and Behader Beg (he calls him Khan) on the other, "for the charge of the widow and the "possession of the estate, and this is ever the case where "the widow has a claim to any considerable inheritance." Be this as it may, the Court gave judgment for the plaintiff, assessing the damages on the principle that she had been deprived of property in her possession to which she was not shown not to be entitled, by an act corrupt and oppressive in its essence and executed in a way needlessly brutal and offensive. The damages were three lakhs of rupees.

Some points seem clear—first, that the widow was treated with great harshness and underwent great indignities. Secondly, that she never got even the quarter of the property assigned to her. Thirdly, that whether it was made in good faith or not, the report of the Cazi and Muftis was to the last degree weak and poor; and, lastly, that the Patna Council were guilty of a gross desertion of duty in this particular case, and that the proceedings, if they established nothing else, proved

beyond question that if the Patna Council was a fair specimen of the rest, the Provincial Councils, considered as Courts of Justice, were absolutely worthless and that no system for the administration of justice which deserved the name existed at that time out of Calcutta. Some of these points are of general interest.

The report made by the Cazi and Muftis shows that those who made it had not the most elementary notions of what is required for the investigation of matters of fact. It does not appear that they held any proceedings in the nature of a trial. They ascertained the most important facts in the case by statements made in casual conversation, not even upon oath, and <sup>1</sup> in some instances by writing notes to which verbal answers were sent back by the persons regarded as witnesses. Impey observed with justice that they accepted the bare statement of the plaintiff Behader Beg as proof of his claim, because it "appeared clear and explicit" without having any evidence at all about it. The report indeed betrays such an absolute unconsciousness of what we should regard as the plainest dictates of common sense on the subject of evidence as to give me an impression of innocence and good faith.

That the Patna Council was guilty of a gross desertion of duty in this case is proved by a letter addressed to them by Warren Hastings, who certainly had no leaning to the Supreme Court in this matter. He <sup>2</sup> says, "I cannot but take notice of great irregularity in the proceedings of the law officers, whose business was solely

<sup>1</sup> *E.g.*, "Notes were thus sent by us to Syud Ahmed, Mir Amir O Dien, and Malcolm. The bearer of the first returned with a verbal answer from Mir Amir O Dien acquainting us that he did not affix his seal to the papers alleged to."

<sup>2</sup> Hastings to Council at Patna, 12th January, 1778; Patna App. No. 7.



“to have declared the laws. The Diwani Court was to “judge of the facts; their” (*i.e.* the Cazis and Muftis) “taking on themselves to examine witnesses was entirely “foreign to their duty; they should have been examined “before the Adalat.” This is in substance what the Supreme Court meant by what it said about “*Delegatus non potest delegare.*”<sup>1</sup> Even Francis thought at first that the Patna Council had delegated their authority, though on further information he changed his mind.

These matters are of much interest from the light which the proceedings incidentally throw upon the way in which the Provincial Councils carried on their judicial duties. It is obvious to me that they did in fact make over all cases of the sort in question to the Mahommedan law officers, who, notwithstanding some sort of colourable appearance of superintendence, did substantially decide these cases, and that practically in the last resort. The reading and confirmation of the report was obviously a mere form.

The report produced to the Supreme Court was itself a most suspicious document. Impey said that various matters “makes [make] us shrewdly suspect that this “identical report never had existence till it was fabricated “for the purpose of this cause.” Though one of the members of the Patna Council, swore that in such cases it was the common course to refer causes to the law officers, to record their reports, and to forward them to the Governor-General in Council, no other report except this one appeared in the book which contained it and which covered the proceedings of six months. The report itself purported to be a translation of a Persian original, but the name of the translator was not given, the original

<sup>1</sup> First Report—Reports of Committees, v. 391.

was not produced, and the translation bore marks of being not the translation of a Persian document, but the account given by an Englishman of a statement by a native. The writer of the report constantly uses the word "will" in speaking of the deeds under which the plaintiff claimed. They would not have been so described in a Persian report drawn up by Mahommedan lawyers. Impey calls them the <sup>1</sup>"Hebenamah" and "Ekrauram," adding that a will would be "Wossayut." "No Persian translator could have construed 'Hebenamah' into will and 'Ekrauram' into deed of gift; from the words themselves no Cazi or Muftis could have given that explanation of them." Impey adds, "It is strange to observe that these gentlemen of Patna who sit in two capacities—in one a Council of Revenue and of State, in the other as a Court of Justice—keep no separate books for their separate departments, nor make any memorandums in their books, in which all their proceedings are confounded when they sit as a Council of Revenue and when as a Court of Justice, and their books are their only records of causes. I believe we might almost say this is the only cause entered in the book."

The Court of Appeal appears to have been as little of a reality as the Court of First Instance. Impey observes that Mr. Young "says that that was an appeal to the

<sup>1</sup> "HIBA —In law a perfect gift, one accompanied by delivery and acceptance. *Hibánama*.—A deed of gift" (Wilson, 207, 1). "IKRAR.—In law the acknowledgment or admission of a right or claim, as of a debt. *Ikrár-i-dám*, corruptly, *Ekraraum*.—A public acknowledgment, declaration, or confession." (Wilson, 215, 2). He adds indeed as one of the meanings of *Ikrar-i-sam*, "a will or testament," but it is the *Hibánama*, not the *Ikrar-i-sam*, which is called "will" in the report. "Wazí, a testator, one who commands, recommends, or bequeaths anything. *Waziat*.—In law a will or testament" (Wilson, 556, 2).

“Governor-General and Council in the Sudder Diwani Adalat, and that the proceedings of the Provincial Council are regularly transmitted by the Governor-General and Council; but Mr. Young gives no instance of any appeal, and I doubt the fact of there having been any since the establishment of the new Government. The Sudder Diwani Adalat was abolished or discontinued in 1777, and it is well-known that the Governor-General and Council never sat in that Court, and we never heard of any Court of Appeal being instituted in its room; in fact, there has not since that period.” The result of all this is that the Provincial Councils had practically and substantially made over their functions to the Cazis and Muftis, and that the body which professed to be a Court of Appeal never sat.

Thus the result of the Patna Cause was to prove that the so-called English Courts were really and substantially not Courts at all, and that they had given up their powers to native judges, from whom there was no appeal. The Supreme Court decided in substance that this was illegal, and that in the particular case the native judges had acted corruptly and oppressively and without jurisdiction.

The strongest and most explicit confirmation of part of this view is to be found in Mr. Bogle's letter to the Governor-General in Council. He says in substance you must either have native judges or none. After saying that

<sup>1</sup> In the India Office copy 5 is added apparently in pencil. In a minute already referred to, dated 11th April, 1775, the majority of the Council say “the Supreme Council have for some months past declined taking cognizance of appeals, in the apprehension that the legality of their jurisdiction might be disputed by the Supreme Court” (General App. 3, enc. 1).

the provinces contain most probably, <sup>1</sup>“ten or twelve million inhabitants,” he says: “The number of Englishmen now employed in carrying on the Civil Government over so many people is probably not above 200 or 300, a very large proportion of these are and must be engaged in different offices at the Presidency, and the greatest part of the remainder are taken up in collecting a revenue of £3,000,000, and in providing an investment for remitting the surplus revenue to England without which these provinces would not be worth keeping. The number therefore of Englishmen qualified for the administration of justice, who could be appointed to that duty does perhaps not exceed twenty or thirty. If the numerous disputes that arise among so many millions of people were to be tried and decided only by these twenty or thirty Englishmen it would be impossible to carry on the government of the country.” He then goes on to say that the regulations under which the Provincial Courts are established “direct that they hear the parties *viva voce*, and if necessary examine evidence,” but he adds as the regulations do not prescribe the mode in which the evidence is to be taken, “The Council at Patna had a right to refer the examination of the evidence in the cause” (they never did so), “which indeed is virtually the same thing as the cause itself, to the Cazi and Muftis.”

In short the Provincial Councils were mere names, and had a right to make over business which they were incompetent to perform, though they had accepted the task of performing it, to the only people who could even pretend to perform it.

<sup>1</sup> Bengal was found at the census of 1881 to contain 66,530,127 inhabitants (*Whitaker's Almanack*).

Such was the famous Patna Cause. Its importance must not be estimated by the history which I have given of it, and which no doubt is tedious. It produced a perfect storm of indignation, not only in India, but in England, and this is not surprising. The decision that Behader Beg was as an ijaradar or farmer, subject to the jurisdiction of the Supreme Court, was declared to have produced a panic amongst the renters of the province of Behar. Shortly after the judgment of the Court was delivered they sent <sup>1</sup> a petition to the Patna Council, in which they asked that they might be allowed to give up their farms and retire with their families to some other country, rather than be subject to the jurisdiction of the Supreme Court. The petition is signed by thirty-nine persons, who would form no doubt a large proportion of the renters of the whole province. How far the Patna Council who forwarded their petition procured it, it is impossible to say. The principal point in the petition is "that "the Zemindars and Ryots are at all times glad "of any pretext to evade the discharge of their rents, "and some consequence and authority is absolutely "necessary to enable a farmer to make his collections, but "when he is liable on any trifling complaints to be "treated in this ignominious manner what influence will "remain to him? or who will be daring enough under "this predicament to exercise any power to enforce the "collections?" This is an obvious allusion to liability to arrest on mesne process and other incidents of the procedure of the Court. The Patna Council said, "We "do not think the hardship of their situation in the "smallest degree exaggerated."

As to this matter, I think that all parties had much to

<sup>1</sup> Patna App. No. 14.

say for themselves. I think the Supreme Court was right in saying that under the terms of the Regulating Act persons employed by the Company to collect the revenue were subject to its jurisdiction, and that whether they were paid by salary or by the profits of a farming contract they were equally within its words. I think it probable that Impey individually was right in saying that the intention of those who framed the act was that this should be the case, as their object was to protect the cultivators and proprietors against the oppressions of the collectors of the revenue.

I think the farmers of the revenue were probably right in saying that if they were subjected to the jurisdiction of the High Court they would not be able to collect the revenue. In other words, I think that a good deal of what English law would regard as oppression would be necessary for the prompt and regular collection of the revenue, and that if the farmers were made liable to actions in the Supreme Court for all their oppressive proceedings they would find themselves greatly hampered in their collections, and deprived of the position which fear gave them over the cultivators.

I think, lastly, that the authors of the Regulating Act were right in thinking that it was an object of the first importance to protect the cultivators against oppression at the hands of the collectors of revenue.

The fault lay in the clumsiness of the remedy provided by the establishment of the Supreme Court.

Outside Calcutta it could be of no use except under conditions which did not exist in India, and though intended to prevent oppression, and honestly employed by the Judges for that purpose, it succeeded only in introducing a remedy nearly as bad as the disease.

That Behader Beg, merely because he had farmed villages, should be liable to be sued at Calcutta for an alleged wrong which had not the remotest connection with the collection of the revenue, and should be subjected to arrest on mesne and hopeless imprisonment on final process, to say nothing of the expenses of litigating in an English Court, was a cruel grievance, though the only persons definitely to blame for it appear to me to be those who legislated in a rash peremptory way on matters of which they knew little, indeed nothing precise and definite.

With respect to the other and even more important points in the case similar observations arise.

The Patna Cause clearly showed that the Provincial Councils were, at least that the Patna Provincial Council was, a mere semblance of a Court which had in practice made over its functions to its own subordinate officers. Impey expressed a hope that the decision would strengthen the Provincial Councils regarded as Courts by impressing upon them the importance of discharging their own duties themselves. To this Bogle with perfect truth replied that this was an impossibility. They had neither the men nor the time (nor, he might have added, the knowledge or education) necessary for the purpose, and their number, six, was ridiculously inadequate for the purpose, and their organisation, if possible, worse. If they did not practically make over their powers to the Cazi and Muftis there would be practically no administration of justice at all in India.

It seems to me that both Impey and Bogle were right. No doubt the Provincial Councils had practically resigned their duties to their subordinates. No doubt they were quite incompetent to perform them personally, and

no doubt it was a question between native judges and none. One thing more is certain. If justice was to be administered by native judges practically free from all control, it was certain that cases of gross corruption and oppression would arise. Even in the present day, any one who proposed to do away with or greatly to relax the severe system of superintendence and appeal which has been established in the administration of justice in India, would be regarded as opening a door to evils which the experience of a century has gone far to eradicate.

In Impey's days there was no doubt a great amount of corruption and extortion. Whether he was right in imputing it to the Cazi and Muftis in the Patna Cause is a matter on which I have no opinion. He may have been wrong, but he may also have been right, and if he was I see no hardship in what befell them. If they really did plunder the woman of her property and treat her with gross indignity by an abuse of powers which the Council had illegally abandoned to them, I do not see why they should not pay for it.

At the same time I think that in this, as well as in the other matters referred to, the Supreme Court was a most unsuitable instrument for the purpose for which it was intended to be employed, and for which Impey and his brethren seem to have done their best in good faith to employ it. They may be compared to carpenters sent into a hospital to perform surgical operations with the common tools of their trade and chopping off with broad axes limbs which may have required amputation, though care and gentleness might have removed the necessity for it. Instead of dealing tenderly with their patients and trying to understand their cases, they judged



them by a standard of their own, discovered "inhuman oppressors" in men who after all may have been at worst ignorant and unbusiness-like, and dealt with institutions which were essentially faulty and rickety simply by dealing destruction in all directions. The Patna Cause brought to light great scandals, but it must have struck terror to the heart of every one engaged in the administration of justice throughout the Company's territories.

The administration of justice by the English in India can never be wholly satisfactory. The difficulties inherent in the enterprise can never be entirely overcome: but a great deal may be and has been done to overcome them, and the existing system, while it has great defects, has nevertheless conspicuous merits. A whole system of law has been enacted which errs perhaps on the side of over-minuteness, but which is at least in the most important parts simplified and made definite to the utmost practicable extent. A network of Courts arranged in different grades and connected together by a system of superintendence, revision and appeal, which may in some particulars be over-elaborate, but which is the best security against oppression or corruption, has been spread all over the country. The great numerical majority of these Courts are presided over by native judges specially educated for their profession, and the result of all this anxious care has been the establishment of a system absolutely different from anything which was dreamt of in India or in England either 100 years ago. It was in efforts like these, and in the vigilance, care, and thought necessary for making them, that the true remedy lay for the evils which the Supreme Court set in a striking light and attempted to remedy by giving heavy

damages against law officers whom they considered to have misconducted themselves.

This view was not, in the then state of knowledge it could not be, taken of the subject in England when these events were brought to public notice, soon after their occurrence. The rooted opinion of that time seems to have been that when anything went wrong in public affairs some particular person's wickedness must be the cause of it. There must be an "inhuman oppressor." Impey thought so, and found his "vultures of Bengal" in the Company's servants European and native. Burke and the Whigs thought so, and found the object of their hatred and contempt in Hastings and Impey. There is indeed a striking similarity between the treatment which Impey himself received from his persecutors in England, and that which the Cazi and Muftis of Patna (always assuming their moral innocence, on which I have no opinion either way) received from himself, Chambers, and Hyde. The Americans turned poor George III. into a heartless tyrant, and so on. The Patna Cause was represented to the British public thus: Three harmless, upright, and venerable or, at least, eminently respectable native judges were, by the wicked tyranny of hateful English lawyers, dragged from their home at Patna to the Court at Calcutta, and there for merely doing their duty as they understood it, condemned upon the strength of a wretched scrap of law Latin—part of the detestable stock-in-trade of their vile oppressors—to pay damages to the extent of about £34,000, or in default to lie in a loathsome dungeon for the rest of their lives. One (the Cazi) actually died in the hands of the tyrants as he was on board the boat which was to bring him to Calcutta.

Here was obviously a case of an inhuman oppressor, and

equally obviously Impey was the man. He had made enemies on all hands. Francis was accusing him of the murder of Nuncomar, the Europeans at Calcutta were accusing him of being a thorn in their sides in various ways to be mentioned immediately. The thorough-going advocates of the East India Company regarded the Supreme Court with aversion as at once the bulwark and the most marked instance of the usurpation by the King of England on what they viewed as the rights of the Company. The union of these various topics of prejudice produced what may be described as the orthodox faith on this subject. It has ever since been the accepted opinion that in this matter, at least, the Supreme Court and Impey, its chief justice, grossly misconducted themselves.

The first step taken in consequence of this view affords conclusive evidence of its incorrectness, and proves that the Court was right, and that the persons really to blame were the authors of the Regulating Act.

In 1781 an act was passed (21 Geo. 3 c. 70) to amend and explain the Regulating Act. It contained several provisions which bore upon, and were suggested by, the Patna Cause. It enacted <sup>1</sup>that the Supreme Court should have no jurisdiction in any matter concerning the revenue or concerning any act done in the collection thereof according to the usage and practice of the country. It recited <sup>2</sup>that the "Governor-General and Council, or some Committee thereof, or appointed "thereby," did as a fact hear appeals from the provincial Courts (an extremely doubtful statement), and enacted that "the said court" (whatever it might be, for they do not seem to have supposed that they knew) shall be a court of record, and <sup>3</sup>a court to

<sup>1</sup> I.S.<sup>2</sup> S. 21.<sup>3</sup> S. 22.

hear and "determine on all offences, abuses, and ex-tortions," and all "severities beyond what shall appear to the said Court customary or necessary" in the collection of the revenue (so that all customary "severities" received express parliamentary sanction). Such offences were to be punished at their discretion by any punishment short of death, maiming, and imprisonment for life. <sup>1</sup> The Governor-General and Council were to have power to frame regulations for the provincial courts—an enactment which was the legal foundation for the body of regulations of which the permanent settlement is the most famous portion.

<sup>2</sup> The act provided in relation to the Patna Cause itself, that the three defendants in custody should be discharged from custody on security for the damages being given by the Governor-General and Council, which security they were required to give. They were also empowered to appeal to the Privy Council against the judgment, although the time for appealing had passed. No provision was made for compensation to the Cazi's family or to the Muftis or to Behader Beg, because the Company had promised to make full compensation to them—a promise which was performed.

On the 28th July, 1784, an appeal, substantially by the East India Company, was entered and referred to a Committee of the Privy Council, but was not proceeded with.

After the House of Commons had declined to impeach Impey on the Nuncomar charge, a faint attempt was made to go on with the charge arising out of the Patna case. When the matter was brought on it was pointed out that the East India Company had not proceeded with their appeal, and that the House would be placed in an

<sup>1</sup> S. 23.

<sup>2</sup> S. 27.

absurd position if they impeached Impey for delivering a judgment which was still in force, and might be upheld on appeal. The Company never did proceed with their appeal. <sup>1</sup>It was dismissed for want of prosecution in April, 1789, and the impeachment never was proceeded with. The effect of all this is, that after all that was said of Impey's enormities, and of the special wickedness of his judgment in the Patna Cause, the East India Company did not dare to have the appeal against it argued. First they let the time pass. They were by statute relieved from that difficulty in 1781. They then let eight years more pass without making a motion in the matter although they had to compensate the clients whose cause they had taken up, and to pay the damages—about £34,000—and, I suppose, the costs which had been awarded to Naderah Begum. How could they have admitted more emphatically that the judgment against which they appealed was good in point of law, and that throughout the fault had lain, not with the Supreme Court, but with the Company's servants? The result of the whole case thus was (assuming the moral innocence of the law officers, which is assuming a great deal), that so grievous a wrong had been inflicted by the East India Company on the plundered widow that they had to pay her £34,000 (apart from interest) besides making liberal compensation to their own law officers for the consequences in which the unbusiness-like ways of the Company had involved them.

The Act 21 Geo. 3, c. 70, further provided <sup>2</sup> expressly that no one should be subject to the jurisdiction of the Supreme Court by reason only of his being a zemindar or ijaradar

<sup>1</sup> See an extract from the Privy Council Records published in Impey's *Memoirs*, p. 346-7.

<sup>2</sup> S. 9.

(the words are not used), and that no servant of the Company should as such be subject to the jurisdiction in cases of inheritance or succession. These enactments like the others show clearly that the Supreme Court correctly interpreted the law as it stood, that their decisions forced parliament to find out its own wishes and express them plainly, and that parliament was the real offender.

The remedy applied by the Act of 1781 was a step in the right direction. Beyond all doubt it was perfectly right that the faults of the native courts, which were many, should be corrected not by actions against the officers of the courts, but by a system of appeal and by legislation. It was also natural that these powers should be put into the hands of the Governor-General and Council, and that the Supreme Court should not be associated with them in their exercise. Such an association must naturally have appeared in such a state of feeling as then existed between the court and the council unnatural and indeed impossible. This, however, was a great misfortune, which continued to exercise a pernicious influence upon the administration of justice in India till the government was transferred to the Crown, and till the High Courts' Act fused the Supreme Court and the Sudder Diwani Adalat into the High Court as at present constituted. Till that time the old abuses to a great extent continued to prevail though they were not complained of. The clumsy remedy of the Supreme Court actions was not applied, but the disease to which it had been applied was not cured. When this was done, and when the various codes,<sup>1</sup> especially

<sup>1</sup> The Codes of Civil and Criminal Procedure were prepared by Sir Barnes Peacock in 1859 and 1861. The Code of Criminal Procedure was

the Codes of Procedure, were prepared (principally by English lawyers holding the place of Legal Members of Council), the whole administration of justice in India was brought into one general system, based upon definitely ascertained principles, and administered by a single set of Courts in each province, the High Courts formed out of the old Supreme Courts and the old Sudder Courts standing at the head of the system in their respective provinces.

During the interval between the days of Hastings and those of modern legislation things went on comparatively quietly, and great improvements were made, but it is impossible to me at least to doubt that the most grievous injustice must have been done, and the greatest encouragement given to fraud, perjury, and oppression of every kind by the perpetuation in the Country Courts of the very faults which were so roughly brought to light by Impey's judgment in the Patna Cause, and which nothing could effectually remove except the introduction of those very principles of English law upon which Impey insisted, and of which the Sudder Courts were profoundly ignorant. I mean the substantial principles as distinguished from the technical rules of evidence. For many years after the days of Hastings evidence was taken by native clerks who were totally incompetent to discharge that duty. The whole system is described in <sup>1</sup>Shore's Notes, and I may quote a

re-arranged and re-enacted during my tenure of office in 1872, and was again re-enacted with provisions extending it to the High Courts in 1882 whilst Mr. Whitley Stokes was legal member. The Code of Civil Procedure was recast and re-enacted in 1877 by Sir Arthur Hobhouse.

<sup>1</sup> Notes on Indian Affairs by the Hon. Frederic Shore, 1837, vol. i. pp. 236-73. Mr. Shore was a son of the first Lord Teignmouth. He wrote on all matters, especially legal matters, in the acrid contemptuous style

few lines to show how in 1837 the taking of evidence "was managed. "The police reports, prosecutors, "prisoners and witnesses, are handed over to different "natives attached to the office, who sit down in an "adjoining room, question them in Hindustani and "take their depositions in Persian, after which the case "is considered prepared. During the last few years a "slight variation has been made in the above routine. In "some Courts the parties are not often now taken into "a different room to give their deposition. It is done "in that in which the magistrate sits, and when brought "up for hearing the officer of the Courts reads off the "depositions in Hindustani. . . . . The writers "who take the depositions do so in the remotest "corners of the room, and are desired to speak in "as low a tone as possible, that they may not interrupt "the judge-magistrate who is attending to other business." One of the most practically important alterations made in this system is embodied in the Codes of Civil and Criminal Procedure which provide elaborately for the taking of evidence by the judge himself, and for his taking and signing notes of the evidence as it is taken. It is remarkable that no part of the whole system was so frequently the subject of complaint to me by the officers who had to administer it as this. They said that it imposed great labour on them, which no doubt was true, and that it prevented them from disposing rapidly of many cases which under the old system might have been speedily disposed of. This also is true. Under the old

which Bentham, James Mill and others made popular, but he had much knowledge and experience, and was a very able man. His work had a great influence on Sir Charles Napier. Shore takes many of his facts exclusively from James Mill, and, like Macaulay, is misled by him.



system no doubt more causes were determined, but I do not believe nearly so many were heard. To do injustice quickly is the easiest thing in the world. To do justice quickly and easily is simply impossible.

The tenacity with which the civilian judges clung to the native system which the Supreme Court attacked so roughly is noticeable. It was as pleasant and easy for the judges as it was disastrous for the suitors.

The article of impeachment against Impey on the Patna Cause is even worse<sup>1</sup> than the article about Nuncomar. It covers twenty-two large folio pages, and appears (for I do not pretend to have read the whole of it) to consist of a history of the whole case, entering into minute details supplied principally by Bogle's letter, which it takes to be absolutely correct, and which it contrasts with Impey's summing up. Where Impey and Bogle differ, the impeachment avers that Impey must have been not only wrong but corruptly and wickedly wrong. To give one instance only. Impey is impeached amongst many other things, because in weighing the evidence of Zekereah, he did not attach sufficient importance to a part of Zekereah's cross-examination, which is set out at full length, being copied out of Bogle's letter.

The foolish declamatory style of the article may be illustrated by one short extract.

"That the said <sup>1</sup>Sir Elijah Impey has frequently "declared it to be his duty to vary the forms of proceedings, and to depart from and vary the rules of "pleading used in the law of England according to the

<sup>1</sup> The draftsman cannot make up his mind how to describe the defendant. He is sometimes "Elijah Impey," less frequently "Sir Elijah Impey," generally "the said Impey."

“circumstances of the country, and has frequently exercised the power and authority so to do.

“That the said Sir Elijah Impey is therefore highly culpable and grossly criminal if ever he permitted the rooted prejudices of the native inhabitants of Bengal, &c., [*sic*], to be shocked, their principles of government overset, their judges and magistrates disgraced, and their laws and religion violated by too strict an adherence to laws suited for another state of society, other manners and a different religion. That the said Sir Elijah Impey was still more grossly criminal if he permitted all this to be done from a rigid adherence to form and not to substance, to technical and minute niceties, and not to leading solid and essential principles; and such a conduct if ever followed cannot be ascribed to ignorance or error in judgment (if ignorance in a Chief Justice could be an excuse), but must be ascribed to injustice, partiality, corruption, and an outrageous lust for power and authority.”

If he had had to draw an indictment charging a schoolmaster with theft this writer would probably have said, “The said A. B frequently declared that honesty was the best policy, and often made his pupils write down these words in their copy-books. If therefore it is proved that he himself feloniously stole, took and carried away five pounds he will appear to be highly culpable, and to have acted not from ignorance (if that could be any excuse in a schoolmaster), but from corrupt and dishonest motives and from an outrageous lust for money.”

I will conclude by reference to one other matter, namely, the way in which the history of the Patna Cause is treated by James Mill, who has been regarded as the principal authority on it. James Mill, by the

almost affected dryness and severity of his style and by the extreme harshness of his censures on others, has acquired a reputation for the accuracy and rigid justice which would be necessary to justify his judgments. It by no means follows, however, that a man is just because he is severe upon others, or that he is accurate because he is dry. Mill's assertions as to the Patna Cause are false, and I think I can point out the origin of their falsehood. The subject is dry, and intricate and I believe that seeing that the greater part of the judgment of Impey and the letter of Bogle, which together fill seventy large folio pages, referred to matters of detail which it was unnecessary for him to study, he either skipped them altogether, or, as I rather think, slightly glanced at all events at Bogle's letter. He then constructed an account of the case out of the notices of justification and Impey's interlocutory judgment, both of which he misrepresents, introducing into the notices of justification matter which they do not state, but which Bogle advances as an argument in support of the case set up by them and entirely suppressing all the important part of Impey's judgment.

A comparison between the matters stated above and the following extract from Mill which is his summary of the case will make this plain. After giving a summary of the notices of justification, which I pass over, he says :

"This defence, which to the eye of reason appears appropriate and irrefragable, the Court treated <sup>1</sup> with the utmost contempt, and upon a ground which raises surprise and indignation. A form of words, among the numerous loose expressions which fall from the lips and pens of English lawyers, without any binding authority or any defined and consistent application occurred to the

<sup>1</sup> This is false. No contempt is shown in the judgment.

“judges. This was the phrase *delegatus non potest delegare*, ‘he who is delegated cannot delegate,’ and <sup>1</sup>upon this and no other reason so much as alleged they decreed that the Cazi and Mufties <sup>2</sup>for acting regularly, acting as they were obliged to act, and had in fact been accustomed to act ever since the jurisdiction of the country had passed under legal control, were liable to actions of damages at the suit of every person whom their proceedings displeased.”

After some denunciation of the absurdity of such a proceeding, which would no doubt have been monstrous, James Mill proceeds, “Deciding upon the strength of this assemblage of words that the provincial council <sup>3</sup>could not delegate any authority to the native magistrates even as their agents, and hence that everything which these assistant magistrates had performed was without authority, the Supreme Court thought proper to enter minutely and laboriously into the whole of the case, and after voluminous proceedings gave judgment against the defendants, damages Rs. 300,000 and costs Rs. 9,208, amounting to the sum of about <sup>4</sup>£35,000.”

<sup>1</sup> This is false. Many other reasons were alleged, which are specified above.

<sup>2</sup> This is false. It should be “for acting, as the Court held, irregularly, corruptly, oppressively, and in a manner authorised, neither by custom nor by the orders of the Council in the particular case.”

<sup>3</sup> This is false. The Court held only that they could not delegate their whole judicial authority, and that in fact they had done so, and that the authority so delegated had been wickedly abused.

<sup>4</sup> This is inaccurate. It is quoted from the report of Touchet’s Committee, which says £34,000 not £35,000. The mistake itself is unimportant, but I have found several such mistakes in Mill which indicate some want of accuracy. This, however, is nothing to his bad faith; my experience is that when he makes imputations, especially on lawyers, Mill ought always to be carefully confronted with the original authorities.

## CHAPTER XIII.

### THE SUPREME COURT AND THE EUROPEANS IN CALCUTTA.—TOUCHET'S PETITION.

THE next incident in the order of time to the Patna Cause was the petition called Touchet's Petition against the High Court by the Calcutta Europeans, which occasioned the sitting of the Committee to the report of which I have referred so often. The immediate cause of the petition was an agitation which arose out of an action tried in the summer of 1778. The petition was drawn up and sent to England in March, 1779, but in order to appreciate the state of things to which it referred it is necessary to say something of earlier incidents.

At the time of the trial and execution of Nuncomar the High Court seems to have been popular with the Europeans at Calcutta. The reasons why it ceased to be so are stated by Impey in his correspondence, and appear probable in themselves although their existence was <sup>1</sup> denied emphatically by some of the witnesses examined before Touchet's Committee. At this distance of time it is impossible except by accident to get anything like complete evidence on the matter. The Court was complained of by the different witnesses examined, as

<sup>1</sup> See in particular the evidence of Mr. Price, p. 77.

being highly technical and very expensive. The notion that its unpopularity arose from its restraining the oppressive practices of the Europeans in Calcutta was eagerly repudiated. The strongest and most remarkable instance of the technicality imputed to it was, that <sup>1</sup> it was said to have discharged as many as sixty or seventy prisoners from gaol because they were not regularly confined—a measure alleged to have greatly disturbed the peace of Calcutta and endangered the safety of property and person there.

It was unfortunate, as the Committee <sup>2</sup> remarked, that no agent was appointed by the Supreme Court, that “a great part of the papers transmitted” had not “been previously communicated to each other by the contending parties,” and that many of the witnesses were partisans. Corresponding remarks of course apply to the statements in Impey’s private correspondence, but I give the most important of them for what they are worth. Some of them are extremely curious in themselves. Others show what his side of the story was. I will notice them in the order of their date.

The first and by much the most curious is an imperfect copy of a paper entered in Impey’s letter book, dated May, 1777, and purporting to be either the copy or a draft of a letter to the Court of Directors. It is signed with the initials of Impey, Lemaistre and Hyde. It relates to the liberation of the prisoners and is curious on many grounds, particularly because it describes incidents identical in their main features with others which occurred within the last year (1884) in Egypt. The letter states that the judges heard that Mr. Mills was inflicting

<sup>1</sup> See evidence of Messrs. Hickey, Price, and Mills. Report, pp. 72-3.

<sup>2</sup> Page 4.

punishment on many prisoners in a prison called the Herrinbarah. "The inquiry verified the information. "We found a large group of miserable objects confined "by the orders of Mr. Mills; some were simply so; some "under sentence from him to <sup>1</sup>beat *Salkey*; others, who "formed the greatest part, loaded with irons and condemned for limited times to work on the public roads. "All these several persons were committed without any "written warrant" [a space here—probably "upon a"] "verbal message delivered by a common peon to the person "officiating as gaoler there. Of the cause of the commitment of some and the duration of their imprisonment "the gaoler was totally ignorant; of some no memorandum "was kept by Mr. Mills or any other person, and such "account of their crimes and commitments can only be "procured, as the recollection of Mr. Mills and his officers "could afford. Others neither Mr. Mills nor his officers "had any recollection" [of]. After stating in detail that Mr. Mills had set up a regular system for the administration of criminal and also civil justice the letter proceeds. "On examination of Mr. Mills and his books it appears "that no witnesses were ever examined on oath, that "flogging [s] were used to extort confession, that many of "the severest punishments were inflicted without proofs, "on public fame, hearsay, or on written messages, and "some even without the charge of any crime being exhibited against them." Mr. Mills, the letter says, claimed to have been appointed by the Governor-General to be Superintendent of Police, but the judges say, "we find the appointment is his own authority, that he "had received no instructions whatsoever, and was "ignorant of the nature and extent of his pretended

<sup>1</sup> To break up old rubbish for mending roads.

“authority.” He had been preceded in this office by <sup>1</sup> another person who had exercised a petty jurisdiction which though they thought it illegal the judges did not feel called upon to interfere with, but Mr. Mills’s conduct had “raised universal terror and clamour, almost tumult “against the vexations and oppressions of the office.” The judges discharged some of the prisoners it seems in a summary way, but certain classes of them who they thought might possibly be legally confined they said they should discharge at the next gaol delivery if no accusation was made against them, and it seems that they did so, as indeed was their obvious duty as justices of gaol delivery under the Regulating Act.

What had happened is obvious. The old system of criminal justice was carried on by Mr. Mills under the authority of the Nabob, who was supposed to administer criminal justice throughout Bengal including Calcutta, notwithstanding the arrival of the Supreme Court and the abandonment or suppression of the old phousdarry Court, and in direct opposition to the provisions which gave the Supreme Court a local jurisdiction essentially exclusive as a Court of goal delivery in Calcutta. The Herrinbarah was just such a prison as British officers found at Lahore in 1847, and at Alexandria in 1884.

The action of the Court both in and out of Calcutta and the causes of its unpopularity are thus described by Impey in a <sup>2</sup> long letter which he addressed to Governor Johnstone dated apparently 18th August, 1778.

“I verily believe the Court has done as much if not “more than was expected from it. If it has not eradicated

<sup>1</sup> Not named, but probably Mr. Pleydell. See as to him pp. 229-30.

<sup>2</sup> This is the letter from which I have already made a long extract as to the reasons why Nuncomar was not respited. See pp. 255-60.



“many evils, yet it has rendered them less frequent, and  
 “made men more cautious in the perpetration of them.  
 “Many abuses have come before the Court and large  
 “damages have been given to the injured, in most cases  
 “large offers have been made to prevent the commence-  
 “ment of suits, or to stifle them when begun.

“In the sittings after the last term some high damages  
 “were proved and given; and a principal Banyan of  
 “Calcutta in the service of an English gentleman paid to  
 “a plaintiff no less than Rs. 40,000 in part of damages,  
 “merely to have the cause of action determined by  
 “arbitrators and prevent it being made publick in Court.

“In and near Calcutta the Court has nearly had the  
 “complete effect of giving security to the persons and  
 “property of the natives. They feel themselves en-  
 “titled to the rights of humanity in common with those  
 “Europeans, the meanest of whom they before considered  
 “as their lord, and they have now courage and confidence  
 “sufficient to assert those rights. For the truth of this I  
 “appeal to witnesses in Europe (Company’s servants in  
 “general, for the reasons I shall hereafter give, must bear  
 “partial testimony), I mean such persons who have been  
 “resident in Calcutta either as merchants or captains, of  
 “European ships. I wish it had its effects as fully in the  
 “more remote parts of the provinces. But that cannot  
 “be expected in the present heterogeneous constitution  
 “of this country. The East India Company, or rather  
 “their servants are no doubt in fact the sovereigns  
 “of this country, and their sway is more arbitrary than  
 “has ever been experienced in any settled form of  
 “government. In settled governments even of the more  
 “arbitrary denomination, if positive laws do not restrain,  
 “yet usages and custom become a law, which controls

“ the will of the despot. Here are no positive laws to  
 “ guide, and the usages and customs are but little known.  
 “ This is the only country within my recollection where  
 “ the supposed interest of the sovereign is to weaken as  
 “ much as possible the administration of justice. The  
 “ two apparent causes are these : first, the introduction of  
 “ judges of the appointment of the King is felt and  
 “ considered as an usurpation on the rights of sovereignty  
 “ exercised in this country, and it is a control, weak as it  
 “ is over the sovereigns themselves, and a tribunal to  
 “ which they may be called. This must be galling to  
 “ despots. The other is that it weakens that favourite  
 “ part of their authority by which they could protect from  
 “ prosecutions their agents and dependants, by which they  
 “ were kept amenable to no justice, but that which they  
 “ choose to. [It is natural that the] Governor-General  
 “ and Council should not lend a ready [ear] to com-  
 “ plaints which tend to strengthen their authority, which  
 “ the abridgment of the powers of the Court certainly  
 “ would. It is owing to that, no doubt, that the servants of  
 “ the Company have been encouraged to write letters to  
 “ the Board on these subjects, with which the Consultations  
 “ are loaded. By this mode they do not complain them-  
 “ selves, for which they have no cause, but they give the  
 “ full effect of showing the Court of Justice to be incon-  
 “ venient. I do not mean by this that the Court has been  
 “ of no use beyond the limits of Calcutta, it has redressed  
 “ many injuries, and suppressed many oppressions.

“ I confess I feel every complaint made against the  
 “ Court by the Company, a confession on their part of the  
 “ utility of it ; were it useless, did it not restrain them,  
 “ though it might injure the natives, they would not  
 “ complain. It is not the natives in general who complain.

“It is either the Company’s servants or those who derive power and influence from them. It is the wolf growling at the chain, whence all on a sudden this compassion for the lambs.”

Such are Impey’s statements as to the state of things which existed in 1778. <sup>1</sup> About the time when this letter was written actions were brought in the Supreme Court against James Creassy by two natives for keeping them in confinement for a night, beating them himself with a rattan cane, and causing his servants also to beat them in order to compel them to leave one service for another. Creassy demanded that the case should be tried by a jury. No counsel would argue his case, as the claim was in direct opposition to the express words of the charter. He accordingly pleaded his own cause, and the Court gave judgment against him with damages to the amount of Rs. 200.

This was the beginning of an agitation which in March, 1779, led to a petition for trial by European juries in civil cases in which Europeans were concerned. They proposed other changes, as for instance that the Governor-General in Council might be invested with a power over the Supreme Court analogous to that supposed to have been exercised by the Chancellor over the Courts of Common Law. This was Touchet’s petition, which led to the appointment of a Parliamentary Committee and the collection of the evidence on which nearly the whole of these chapters is based.

Impey’s observations upon it, made partly in a letter to Lord Weymouth and partly in his private correspondence, are obvious, and are substantially the same as those

<sup>1</sup> Impey—Lord Weymouth, 26th March, 1779. General App. No. 31.

made by Mr. Rous, the standing Counsel of the Company in England.

<sup>1</sup> Mr. Rous said, "Admit the trial by jury in civil cases "and the oppressors themselves will decide the degree of "compensation for their own wrongs." As to the proposal to give an appeal from the Supreme Court to the Governor-General in Council, Mr. Rous says it would be better to abolish the Court altogether. I do not think it can be doubted that the petition shows that the Court was objected to by the Calcutta Europeans because it put a strong restraint upon oppressive practices to which they were much addicted, of which the action against Creassy is an illustration.

An important remark arises upon it, however, which shows the extreme danger of the course taken by the Council in regard to the Rajah of Cossijurah to be noticed immediately. This is that the movement was to a great extent a military one. One admitted practical difficulty of having a trial by jury was the want of jurymen; this the petitioners proposed to overcome by establishing a panel of volunteer jurors. Out of 313 persons who offered to serve on the panel, 104 were military officers. A very large proportion of those who signed the petition appear to have been officers. The officer who commanded the artillery, Colonel Pearce, "carried the petition to the "Camp. After a field day he convened his officers, had "the petition read to them and showed to them with his "signature to it. More officers who were not present, "were afterwards sent for and the petition showed to them "in like manner. The Colonel with great warmth informed us in open Court that the officers of his corps "had signed to a man."

<sup>1</sup> See his opinion, Gen. App. No. 39.

Impey also says in the same letter that Hastings had told him that he had heard from Barwell that another petition "was in agitation to be addressed to the Governor and Council to require them (as hostilities had been commenced in India against the French) to proclaim that the settlement was now under military law." Impey says the Court did not fear that this would be done, but it shows the power of the army.

In his private correspondence he gives further particulars. In <sup>1</sup>one letter he says, "the persons who have been the original instigators in this business are Colonel Watson, against whom an ejectment was tried, and Mr. Cotterill, defendant in an action for assault, &c. You will see by the names to the petition how active the military have been." After mentioning some of them he says, "They talk of their rights being indefeasible like Americans, and in case of want of success to follow their example. An attempt was begun to get a petition presented to the Governor-General in Council to proclaim martial law in the settlement, but that was immediately suppressed." As to the proposal to have civil causes tried by European juries he says in the same letter, "I have heard it was not impolitic to set a thief to catch a thief, but it has never yet been proposed at the Old Bailey to try a highwayman by a jury of highwaymen."

The language said to have been used by the military must appear to us in the present day too extravagant to have been of any importance, but those who think so forget that even in our own days one of the most serious dangers which ever threatened India was what was called the white mutiny which followed the suppression

<sup>1</sup> Impey—Kerby (his agent), 26th March, 1779, Impey MSS.

of the mutiny of the Sepoys, because the Company's European forces thought they had been unfairly treated. All through the early history of the Company mutiny by its European troops was a <sup>1</sup>standing danger, and at the very crisis of the American war, when the communication between England and India was almost cut off, when the American Colonies were in open revolt, and Ireland on the very brink of it, the Company's army might well think that they could do as they pleased and establish themselves, if not as an independent power, at all events as the practical rulers of the Company's territories. This might be a dream, but it might also have terrible practical results, and Hastings and his Council ran a risk of encouraging these feelings to the utmost by calling in the army against the Court, as they did on the occasion now to be noticed.

<sup>1</sup> See Lord Minto in India, pp. 201-2 note, for a list of mutinies by the Company's troops. .

## CHAPTER XIV.

### THE COSSIJURAH CAUSE.

THE proceedings in the Patna Cause took place in the years 1777, 1778, and 1779. It was followed by a cause known as the Cossijurah Cause, which began in 1779, and in the beginning of 1780 brought the quarrel between the Court and the Council to a crisis.

Cossinaut Baboo had lent a large sum of money to the Zemindar of Cossijurah, and had tried for a considerable time to get the money from him through the Calcutta Board of Revenue. As this process did not succeed to his wish, Cossinaut sued the Zemindar in the Supreme Court, filing on the 13th August, 1779, an affidavit which stated that the Zemindar was employed in the collection of the revenues. The collector of Midnapore, Mr. Peiarce, informed the Governor-General in Council of this, and said that the Zemindar was concealing himself in order to avoid service of the writ, to the damage of the revenue which he ought to have been collecting. The Governor-General and Council consulted the Advocate-General Sir John Day, and received from him a singular opinion, in which after a long preface to the effect that <sup>1</sup> "we and our Courts stand upon a problematical title and questionable

<sup>1</sup> Cossijurah, App. No. 5.

“ground,” so far as relates to the rights of the natives, he says that the question is, “whether the few remaining “rights of a people to whom we have left but little,” shall be invaded. He adds that the view taken by the Court of the Regulating Act is wrong, and he says, “I “advise that in the case now referred to, the Zemindar “have notice that not being subject to the jurisdiction “he shall not appear, or plead, or do or suffer any act “which may amount on his part to a recognition of the “authority of the judicature as extending to himself.”

An order is <sup>1</sup> stated by Impey to have been issued to all landholders to inform them that they were subject to the jurisdiction of the Court only if they were servants to the Company or had subjected themselves by their own consent to the jurisdiction, and that if they did not (apparently in their own opinion) fall within either class they were to pay no attention to the process of the Court. Impey comments on the terms of this proclamation, which he says were intentionally disrespectful both to the Court and to the King, who is called “the English King” without any title, the object being, as Impey suggests, to avoid conveying the notion that the King of England had any authority as King in Bengal. Besides this general proclamation a special direction to the same effect was given to the Zemindar of Cossijurah, who thereupon took no notice of the further process of the Court. His people beat off the sheriff and his officers when they attempted to take him under a *capias*. Hereupon a writ was issued to sequester his property to compel appearance, and the sheriff collected a force of fifty or sixty sailors and others who marched armed from Calcutta to Cossijurah

<sup>1</sup> E. Impey to Lord Weymouth, March 2, 1780 (Cossijurah App. No. 26).



in order to effect their purpose. This they did, as it was alleged by the Rajah with great violence and with acts of disrespect towards his idol and zenana. The Governor-General and Council ordered Colonel Ahmuty, who was in command of troops at Midnapore, to march a force of sepoys against the sheriff's party and arrest them. He did so. Attempts were made to attach the officer who commanded the troops, as for a contempt, but the execution of this process also was prevented by military force. Finally actions were brought against Hastings and the other members of Council individually by the plaintiff in the action against the Rajah of Cossijurah. At first they entered appearances, but when they saw the terms of the plaint against them, which showed that they were sued for acts done in their public capacity they all (except Barwell) caused their counsel to make a declaration in Court that they withdrew their appearances, and that they would not submit to any process which the Court might issue against them.

The only person who actually suffered in any way for the part he took in the matter was Naylor, the attorney of the Zemindar. He was required to answer interrogatories on the part he had taken in it and was committed for contempt in refusing to answer, but it is not necessary to go into this matter, nor to enter minutely into any of the facts. Substantially the matter may be stated in two words. The Council declared to all persons in Bengal out of Calcutta that they need not take any notice of the process of the Court, and that if the Court attempted to enforce its process the Council would by an exertion of military force prevent it from so doing.

The explanation of the measures taken by the Council is simple. For a variety of reasons, most of which are

quite natural and intelligible, they hated the Supreme Court. It represented an authority which the Company's servants practically repudiated. It represented English law, which they hated both for its defects, which no doubt were then great, and for its merits. No doubt they thought it was a great grievance, and indeed it was one, that Behader Beg should be brought from Patna to Calcutta, to plead his cause in a purely English Court; but they probably felt it a much greater grievance that the Ijaradars and Zemindars should be interfered with, if, in order to pay their revenue punctually, they squeezed their ryots in a way which English lawyers would describe as oppressive or extortionate. They may have thought that the Court went beyond the powers given it by the Regulating Act, but they were by no means sure of it. If they had been they would have taken the legal straightforward course of getting a direct decision from the Court upon the questions in which they were specially interested, and testing its correctness by an appeal to the King in Council. They could easily have done so, and had between 1775 and 1780, five years, in which to do it. From this test, though Impey suggested it repeatedly, they invariably shrank. The course which they ultimately took was simple, they had the military force in their hands, they had public feeling with them, and they preferred using that force to appealing to the common superior of both Court and Council. There is a vague impression that the Council forcibly interfered with the Court because the Court had assumed jurisdiction over the Zemindars, as such. This is entirely incorrect. The Court never held that Zemindars as such were in the Company's employment, and so subject to their jurisdiction. They uniformly held the reverse. Bogle expressly

says so in a <sup>1</sup> report to the Council dated 13th November, 1778, in the following words. "Since the establishment of the Supreme Court no question has been agitated before it which could bring the rights of the Zemindars to a discussion. Many suits indeed have been commenced against them, but they have always pleaded to the jurisdiction; and except when their cause happened to be managed by an unskilful attorney, their plea has always been sustained. They have been considered as landholders, possessed of extensive territories paying a certain land-tax or assessment to government. This exception of the Zemindars from the jurisdiction of the Supreme Court has served perhaps more than any other cause to set limits to the embarrassment which the introduction of an institution so new and so little congenial with the principles of their government was likely to have produced. A powerful class of men, under whose protection the great body of the people lived, continued to feel no superior but the Company's government; to know no laws but the usages and customs of the country, and to preserve throughout the interior parts of these provinces the ancient modes of government by which the revenue is collected and the peace and subordination of society preserved." It appears therefore that the Zemindars cannot be rendered more independent of the Court by any decision that may be passed regarding them, but a judicial inquiry into their rights and tenures whenever it shall happen is likely to have important consequences in the government of the country."

It is impossible to give clearer or more weighty evidence than this, for Bogle was the commissioner of law suits,

<sup>1</sup> See General Appendix No. 12.

and it was upon his criticisms of the Patna Cause that the impeachment of Impey on that matter appears to have proceeded.

Impey's <sup>1</sup> statement on the subject to Lord Weymouth is equally explicit. "The Court does not, nor ever did, "claim any jurisdiction over Zemindars, simply as "Zemindars, but that their character of Zemindars will "not exempt them from the jurisdiction of the Court if "they be employed or be directly or indirectly in the "service of the East India Company or any other British "subject."

An admission to the same effect by the Council themselves is contained in their letter to the Directors, <sup>2</sup> January 25th, 1780, as is noticed more particularly below.

The real ground of quarrel between the Court and the Council went far deeper than any of the topics of grievance on which so much has been said. The Court held, as they could not but hold, that every one in Bengal, Behar and Orissa was subject to their jurisdiction, to this extent that he was bound, if sued in the Supreme Court, to appear to plead to the jurisdiction. The whole contention of the Council was that this was not so, and that if any one not being an Englishman born, or in the pay of the Company, was sued in the Supreme Court he was justified in taking no notice of its process. In other words, every defendant was to judge in his own case whether he was subject to the jurisdiction of the Supreme Court or not, residents in Calcutta only excepted. This was equivalent to confining the jurisdiction of the Court by force to the town of Calcutta. The arguments of the

<sup>1</sup> March 12th, 1780, Cossijurah App. No. 25.

<sup>2</sup> General App. No. 18.

Council and the Court on the subject appear at length in a <sup>1</sup>despatch to the Directors by the Council dated 25th January, 1780, and in two letters from Impey to Lord Weymouth <sup>2</sup>dated, March 2nd and 12th, 1780.

It is difficult to put at once shortly and fairly the views of the two parties. The letter of the Council is full of topics of prejudice and introductory matter which has nothing to do with the legal merits of the case, but the essence of their argument is, I think, this :

The Regulating Act gives you, the Supreme Court, no jurisdiction at all over the great bulk of the native population, but expressly excludes them from your jurisdiction, except in a few particular and very special cases. If you assume a general jurisdiction to compel people to try before you the question whether they do or do not fall within one of those small classes, you subject them to a hardship from which the legislature meant them to be exempt. "We know of no express law "which conveys to it the rights in question, and the "plain and literal construction of the only law under "which it acts is a direct prohibition of it. Wherefore "we conceive ourselves to be warranted in declaring "every opposition to the Court in the attempt to "stretch its powers beyond their legal bound to be "in itself illegal, and, in the relation in which we stand "to the Government, <sup>3</sup>an indispensable duty, as that "attempt is in the authors of it illegal and a departure "from their duty."

The letter insists at great length on the hardships connected with the jurisdiction, and refers more particularly

<sup>1</sup> General App., No. 13.

<sup>2</sup> Cossijurah App., Nos. 26 and 25.

<sup>3</sup> Some such words as "this declaration," "appears to us an" seem to be wanted here.

to the case of Mahomed Rheza Khan, who some time after his acquittal was restored to the office of Nawab Nazim. Process had been issued against him from the Supreme Court. The Council appear to have regarded him as a typical case. "Not owning allegiance "to the king nor obedience to his laws; having been "born and educated, and now living and having always "lived out of his protection; deriving no benefit or "security whatever in life or member, in fame, liberty, "or fortune, from the administration of justice under "those laws,<sup>1</sup> and not having therefore the common consideration for which men at the first formation of society "surrendered those portions of their natural liberty the "aggregate of which constitutes the authority of the "State, he claims, we conceive of right, as thorough an "exemption from the controul of our laws, as nature "has given him an alienage from us in blood, temper, "and complexion."

This was just as true of the rest of the population as it was of Mahomed Rheza Khan, so that the Council actually put their resistance to the Supreme Court expressly on the ground that Parliament itself had no authority to legislate for natives of India, and that if it affected to do so its enactments must be evaded or resisted.

The Council are not, however, consistent in their defence for their conduct. They say elsewhere (para. 27) that they could have pointed out to the Court the persons who were the proper objects of its jurisdiction, and that if the Court would have agreed to accept their statements as conclusive on this point they would have enforced the process of the Court. This shows the

<sup>1</sup> This is in style more like Francis than Hastings.

hollowness of their professions about the rights of the natives.

They also <sup>1</sup>admit that the Court had never asserted jurisdiction over Zemindars as a class, and that their "exemption had been frequently declared in loose and "extra-judicial intimations," which had prevented such suits being proceeded with.

The letter deals with many other topics, but the net result of the whole appears to me to be that the jurisdiction of the Court outside Calcutta was destroyed by military force in the face of the Regulating Act, because the Court was highly unpopular, and because some real defects and grievances incidental to its process emboldened the Council to strike a blow at principles which the East India Company detested, and at a control over its own proceedings which was open to great objection and was most unwelcome to them, though intended (not wisely) to be imposed by the Act.

<sup>2</sup>Impey's letters to Lord Weymouth vindicate the

<sup>1</sup> Paragraph 20, near the end.

<sup>2</sup> Cossijurah App., Nos. 25 and 26. These letters are grossly misrepresented by James Mill. (iv. 241). He says of them and of another letter of March 25th (Gen. App. No. 31), "In vindication of the "attempt to force the jurisdiction of the Court upon the Zemindars "it is affirmed that although as Zemindars they were not subject to "that jurisdiction, yet as renters and collectors of the revenue, they are "included in the description of servants of the Company." This is wholly untrue. There are no expressions to that effect in any part of either of the three letters referred to. In the letter of March 12th, Impey says, "The Court does not, nor ever did, claim any jurisdiction over "Zemindars, simply as Zemindars, but that their character of Zemindars "will not exempt them from the jurisdiction of the Court if they be employed directly or indirectly, in the service of the East India Company "or any other British subject." Mill thus makes Impey say that all Zemindars are subject to the jurisdiction of the Court, though not as Zemindars, while in fact he lays down a rule by which most of them were not subject to it at all. Mill says that Impey vindicated what in fact he repudiated.

proceedings of the Court in a way which, as to mere law, is unanswerable. He says, for one thing—"Two complaints have been particularly directed against the Court—one, that it has exceeded its jurisdiction; the other, that its executive officers have been guilty of great abuses; and for captivating a more than ordinary attention to these complaints, they have held them out as causes which affect the revenue." . . . . "The complaint of our exceeding our jurisdiction commenced early in the time of Sir John Clavering; nor has any new point, to the best of my recollection, been determined concerning it. Yet no appeal has been made, or any judgment given on any plea, to the jurisdiction." . . . . "I have frequently desired the Governor-General that if he was dissatisfied one of these courses should be taken, that the question might be submitted to His Majesty in Council and finally determined. As there have been no such appeals or prosecutions, I trust we shall not be censurable for excess of jurisdiction on mere clamour and unexamined accusations, without some one authentic document be transmitted to England to evince that in some one case the facts proved on the plea to the jurisdiction were not solid grounds for our determination of it."

To this challenge the abortive attempt to impeach Impey was the only answer ever given.

Another passage in the same letter is very noticeable. It is exactly to the same effect as much that might be said in the present day in answer to the charge that the modern English procedure in India favours the money lender and oppresses the tenant.

"The real hardship to the Zemindars, &c., is that they should be submitted to any regular tribunal who can punish their crimes, and make them fulfil their contracts



“to the Government; and the <sup>1</sup>Company’s servants, who are in hopes to be in high stations distant from Calcutta <sup>1</sup> that they are not permitted to protect them either from punishment or just claims. The argument in favour of Zemindars, &c., as to exempting them from the Court, which is most relied on, and has been seriously insisted on to me, is that they have contracted debts at high interest when there was no such thing as regular justice, that the contracting parties never expected that the money could be recovered by course of law, that the lender only depended on the contingency of obtaining a patron who would be able to compel payment from the borrower, and the borrower at the same time looked to find as powerful a patron who would secure him from the demands of his creditor.”

In the letter of March 2nd Impey was so injudicious as to complain loudly of the effect which the course taken by the Council had had on the business of the Court. He said the business had fallen off near a third, and that when the pending causes were disposed of the Court would only have a few Calcutta causes to try. “The advocates, attorneys, and officers of the Court who have not already succeeded, will be reduced to a most deplorable situation.” His enemies have laid hold of these expressions to say or suggest that the Court, in their contest with the Council, were actuated by corrupt motives, the wish of getting business and so power and patronage. For my own part, I do not see that their conduct was indirect or improper, though I think the Regulating Act had imposed inconvenient duties upon them. I dare say that Impey did wish his Court to

<sup>1</sup> The sense seems to require some such words as “real hardship of the” and lower down “is.”

have a good deal of business, though it made no difference to the judges, who were paid not by fees but by salaries; and though Impey truly remarks in his correspondence "the less my jurisdiction the greater my ease." I do not know why Impey should be willing to commit all sorts of crimes in order to have the privilege of disentangling such masses of perjury, confusion, and hopeless bewilderment as are to be found, for instance, in the Patna Cause.

Such was the Cossijurah Cause. It seems to me that the Council acted haughtily, quite illegally, and most violently, without any adequate reason for their conduct. In the result their conduct did not do any great harm so far as I know, but this was rather an instance of good fortune than a proof of good policy. A more discreditable spectacle, and one better calculated to break down all discipline and order than that of a governing Council marching troops against the officers of the Supreme Court, can hardly be imagined.

## CHAPTER XV.

### THE SUDDER DIWANI ADALAT.

THE matters just described led up to and caused the last matter of importance on which Impey was impeached. This was his appointment to be judge of the Sudder Diwani Adalat. The history of this transaction is as follows:—

One result of the Patna Cause had been to throw a glaring light on the discreditable state of things which existed in the Provincial Councils. They were colourable imitations of courts which had abdicated their functions in favour of their own subordinate officers, and though their decisions were nominally subject to an appeal to the Governor-General and Council, the Appellate Court was an even more shadowy body than the Courts of first instance. The Court never sat at all, though there are some traces of its having at one time decided appeals on the report of the head of the Khalsa or native exchequer, just as the Provincial Councils decided them on the report of the Cazis and Muffis.

The actions brought in the Supreme Court had not only forced this state of things into notice, but had provided a kind of remedy for it—rough, violent, and ill-

conceived as that remedy was. The remedy, indeed, was so violent that it is easy to believe that it must have gone far to shut up the courts and deprive the inhabitants of everything in the nature of an administration of justice. This had in its turn been met by violence of a still harsher and more sweeping kind. The Council had marched Sepoys against the sheriff's officers, and had issued a proclamation, the practical effect of which was to confine the jurisdiction of the Supreme Court to Calcutta, and to warn those who lived outside of it that they need take no notice of its process. In this state of things it was necessary to do something, and the Council accordingly adopted a new plan for the arrangement of the business of the provincial councils. It was divided into two parts—the revenue business and the judicial business, which consisted in deciding civil suits between private persons. Courts were established for these civil suits at each of the towns where the six Provincial Councils sat, and afterwards at other places as well. In each there was a judge with the title of superintendent of the Diwani Adalat, an appeal lying to the Governor-General and Council in the court of Sudder Diwani Adalat. A letter from <sup>1</sup>Impey to Dunning on this matter is worth reading. It is undated, but must have been written in the spring of 1780.

“The corruption and mal-administration in the Adalats, or country courts of justice in which the members of the provincial councils presided, was so notorious, that when the resolution was taken to oppose the legal functions of the Supreme Court, it was thought necessary at least to preserve some appearances of having justice administered in the provinces. The Government

<sup>1</sup> Impey MSS.

“ has therefore abolished those Adalats and erected new  
 “ ones, over each of which is placed one of the *junior*  
 “ servants of the Company, who is (which was never  
 “ expected before of any judge of an Adalat) to take  
 “ oath to administer justice impartially and accept no  
 “ bribes. The gentlemen appointed judges are, for

“ Patna, John Guichard Booth,	made a writer in 1776,
“ Dacca, Alexander Duncanson,	„ „ 1772,
“ Dinagepoor, Benjamin Grindal,	„ „ 1773,
“ Burdwan, Hugh Austin,	„ „ 1772,
“ Moorshedabad, Thomas Ives,	„ „ 1773,
“ Calcutta, Thomas Dugal Campbell „	„ 1771.

“ Each of these, except the two last, decide not only on  
 “ more property than the Supreme Court, but I believe I  
 “ might safely say than all the Courts in Westminster Hall  
 “ put together. Mr. Booth gives law to the whole province  
 “ of Behar. Though the provincial councils had com-  
 “ plained of the adalats as parts of their offices which were  
 “ burthensome, responsible, and unprofitable, and pro-  
 “ fessed to wish to be discharged of them, on the separa-  
 “ tion of them from the councils there was almost a  
 “ mutiny among them. Mr. Morse, one of the advocates  
 “ of the Supreme Court, applied to the members of the  
 “ Council and obtained a promise of being appointed one  
 “ of the new judges; but when this was known to the  
 “ Company’s servants it raised so general a clamour that  
 “ the promise was not adhered to. It will be naturally  
 “ imagined, as these men were selected not from the  
 “ *senior servants*, that they stood distinguished for peculiar  
 “ qualifications; but this is notoriously otherwise, except,  
 “ perhaps, in the case of Mr. Campbell. One of them,  
 “ Mr. Booth, is of the meanest natural parts, is totally

“illiterate in his own and ignorant of any Eastern language, and is one of the lowest, most extravagant, ‘dissipated young men in the country. I doubt whether he is of age. <sup>1</sup> Mr. Otto Ives considered the salary of his office, viz. 1,200 sicca rupees per month, so little worth his consideration if restrained from other emoluments, and had so little idea of any other moral restraint from corruption than the oath, that he for some time hesitated whether he should submit to the taking of it. These innovations were made without the least intimation, public or private, being given to me, or, I believe, to any other of the judges. The Sudder Adalat, or Court of Appeals, which had been discontinued ever since the appointment of the Governor-General and Council, was at the same time revived, but has not yet sat. Causes of consequence involving rights to zemindaries, &c., are not, as formerly, determined there, but by the Board at large, simply on the report of an English gentleman, called Keeper of the Khalsa (exchequer) Records, without any evidence coming before the members of the Council.”

This letter is remarkable in many ways. In the first place it shows what a miserable state of things existed in regard to the administration of justice. In the second place it shows that the measures taken by the Council had absolutely disabled the Supreme Court, and indeed confined it to Calcutta. In the third place it expressly asserts that the judges in general, and Impey in particular, had no notice of what was intended, and appears to complain of this as a piece of neglect or disrespect.

<sup>1</sup> In his letter to the Council covering the code of civil procedure which he prepared, Impey acknowledges great obligations to Mr. Ives for his assistance in that work. Let us hope the remark in this letter was ill-founded.

This state of matters lasted six or seven months. <sup>1</sup> On the 29th September, 1780, Hastings recorded the following minute:—

“The institution of the new Courts of Dewannee Adalat has already given occasion to very troublesome and alarming competition between them and the provincial councils, and too much waste of time at this Board.

“These, however, manifest the necessity of giving a more than ordinary attention to these Courts in the infancy of their establishment, that they may neither pervert the purposes, nor exceed the limits of their jurisdiction, nor suffer encroachments upon it.

“To effect these points would require such a laborious and almost unremitted application that however urgent or important they may appear, I should dread to bring them before the consultation of the Board, unless I could propose some expedient for that end that should not add to the weight of business with which it is already overcharged.

“That which I have to offer will, I hope, prove rather a diminution of it. By the constitution of the Diwani Courts they are all made amenable to a superior Court called the Sudder Diwani Adalat, which has been commonly, but erroneously, understood to be simply a Court of Appeals. Its province is, and necessarily must be, more extensive. It is not only to receive appeals from the decree of the inferior Courts in all causes exceeding a certain amount, but to receive and revise

<sup>1</sup> The following statement is taken from the case laid by the East India Company before their counsel, printed in Reports from Committees, v. p. 417 and following, in which the documents are printed. The case is not dated, but the answers of counsel are dated December 19th and 20th, 1781.

“all the proceedings of the inferior Courts, to attend to their conduct, to remedy their defects, and generally to form such new regulations and checks as experience shall prove to be necessary to the purpose of their institution. Hitherto the Board has reserved this office to itself, but hath not yet entered into the execution of it, nor, I will venture to predict, will it ever with effect, though half of its time were devoted to this single department. Yet without the support and controul of some powerful authority held over them, it is impossible for the Courts to subsist, but they must either sink into contempt, or be perverted into the instruments of oppression.

“This authority, I repeat, the Board is incapable of exercising, and if delegated to any body of men or to any individual agent not possessing in themselves some weight independent of mere official power it will prove little more effectual. The only mode which I can devise to substitute for it is included in the following motions which I now submit, on the reasons premised, to the consideration of the Board :—

“That the Chief Justice be requested to accept of the charge and superintendency of the office of Sudder Diwani Adalat under its present regulations, and such other as the Board shall think proper to add to them or to substitute in their stead, and that on his acceptance of it he be appointed to it and stiled the judge of the Sudder Diwani Adalat.

“I shall beg leave to add a few words in support of this proposition on different grounds. I am well aware that the choice which I have made for so important an office, and one which will minutely and nearly overlook every rank of the civil service, will subject me to much



“popular prejudice, as its real tendency will be misunderstood by many, misrepresented by more, and perhaps dreaded by a few. I shall patiently submit to this consequence, because I am conscious of the rectitude of my intentions, and certain that the event will justify me, and prove that, in whatever light it may be superficially viewed, I shall be found to have studied the true interest of the service, and contributed the most effectually to its credit.

“The want of legal powers, except such as were implied in very doubtful constructions of the Act of Parliament, and the hazards to which the superiors of the Diwani Courts are exposed in their own persons from the exercise of their functions, has been the principal cause of their remissness and equally of the disregard which has been in many instances shewn to their authority. They will be enabled to act with confidence, nor will any man dare to contest their right of acting when their proceedings are held under the sanction and immediate patronage of the first member of the Supreme Court, and with his participation in the instances of such as are brought in appeal before him and regulated by his instructions. They very much require an instructor, and no one will doubt the superior qualifications of the Chief Justice for such a duty.

“It will be the means of lessening the distance between the Board and the Supreme Court, which has perhaps been, more than the undefined powers assumed to each, the cause of the want of that accommodating temper which ought to have influenced their intercourse with each other.

“The contest in which we have been unfortunately engaged with the Court bore at one time so alarming a

“tendency that I believe every member of the Board foreboded the most dangerous consequences to the peace and resources of the Government from them. They are at present composed, but we cannot be certain that the calm will last beyond the actual vacation, since the same grounds and materials of disunion subsist, and the revival of it, at a time like this, added to our other troubles, might, if carried to extremities, prove fatal.

“The proposition which I have submitted to the Board may, nor have I a doubt that it will, prove an instrument of conciliation with the Court; and it will preclude the necessity of assuming a jurisdiction over persons exempted by our construction of the Act of Parliament from it; it will facilitate and give vigour to the course of justice, it will lessen the cares of the Board, and add to their leisure for occupations more urgent and better suited to the genius and principles of Government nor will it be any accession of power to the Court; where that portion of authority which is proposed to be given is given only to a single man of the Court, and may be revoked whenever the Board shall think proper to resume it.”

Sir Eyre Coote agreed to the arrangement as a temporary expedient. Wheler and Francis objected to it on various grounds, the most interesting of which may be shortly stated: Wheler pointed out that the legality of the whole transaction was questionable. Hastings admitted that the power of the Council to establish the Adalats and the then Court of Appeal was dependent on “a very doubtful construction” of the Regulating Act. This implied that the power to make Impey Judge of Appeal over them was at least equally doubtful. Impey’s acceptance of the office would not in

itself remove these doubts. The appointment would not in principle affect the questions between the Court and the Council, though it might, so far as Impey individually was concerned, "prevent their clashing for a time." The appointment of the Chief Justice was opposed to the spirit of the Regulating Act, and might introduce English law and English lawyers into Mofussil litigation and put him in a position which "might too much hide the Government from the eye of the natives."

Francis objected that the proposed appointment would be and be understood as "a direct contradiction or desertion of everything we said and did in the case of the "Rajah of Cossijurah," and would be so understood by the natives. "In fact," he added, "if it was not intended to reinstate the Court in the exercise of the jurisdiction which it had claimed, and which we had resisted, it is probable they would think that some greater evil was to befall them." He argued at length against mixing up the duties of a Court of Appeal with those of a Board of superintendency. He said that the appointment would give the Chief Justice control over the rights of the Company, as, in his capacity of Judge of the Sudder Diwani Adalat, he would be able to submit to the Supreme Court in cases in which the Council on their principles would resist. Besides, the other Judges of the Supreme Court would retain all their powers, and "as the two puisne judges cannot but feel themselves wounded by this partial selection of the Chief Justice, and the preference given to his superior qualifications, we ought not to offer them such cause of offence." Moreover, the appointment would place the Chief Justice in an inconsistent position. He might do some act, as Judge of the Diwani Court, which would subject him to

an action before the Supreme Court; or he might, as Chief Justice of the Supreme Court, be called on to issue a *habeas corpus* for the release of some one whom he had committed as Judge of the Diwani Court. In other ways his duties in his two capacities would clash. The appointment of a single ultimate Judge of Appeal was in itself objectionable, because such a judge would be peculiarly open to corruption by being relieved from the main checks upon it. Moreover, his liability to removal by the Council might make him "in the hands of a "corrupt Council an instrument of oppression."

On the day on which these minutes are dated (24th October, 1780), the Governor-General recorded a further minute, in which he recommended that the salary of the office should be Rs. 5,000 (Sicca) per month, and Rs. 600 (Sicca) for the rent of an office—in all, Rs. 67,200 (Sicca), less the rent of an office, or, say, 6,500*l.* a year; but this matter was adjourned to the next meeting of the Board.

<sup>1</sup> Before the question as to salary was decided Sir Eyre Coote went to Madras as Commander-in-Chief, and thereupon Wheler and Francis became a majority, and "of course, if the question had been put, it would have "been lost."

On the 12th November, Impey wrote to <sup>2</sup>his brother:—"Notwithstanding the disagreeable contests during which "I have made it my duty to support the independence "of the Supreme Court against the aggression of Govern- "ment, the Governor and Council have solicited me to "accept the superintendency of the native Courts of

<sup>1</sup> This appears from the evidence of Francis before the Committee on the administration of justice in India. See Reports of Committees, v. 390.

<sup>2</sup> Impey's *Memoirs*, p. 220. I think I saw the letter at the British Museum.

“Justice, and to preside in the tribunal of *dernier appeal* called the Sudder Diwani Adalat. Such a trust reposed in me under circumstances which bear the strongest testimony of my having acted, though in a manner adverse to them, yet under a sense of public duty, cannot but be flattering to me. This new office must be attended with additional labour, but in the hope that I may be able to convert these Courts, which from ignorance and corruption have hitherto been a curse, into a blessing, I have resolved to accept it. No pecuniary satisfaction has been offered to me, but I do not suppose it is intended that my trouble is to go unrecompensed.”

There is a letter to Dunning of the same date, and nearly in the same words; and he seems to have written to the same effect to Thurlow. In the <sup>1</sup> draft of the letter to Dunning occurs this parenthesis: “*To Lord Thurlow.*—I believe that you will recollect before I left E. a conversation I had with you on an idea, if a proposition of this sort might be made to me on my arrival in I., when you approved my accepting.” To Dunning he says: “As I understand this met with some opposition from Mr. Francis, I think it not improbable it may be matter of discussion.”

These letters show that in November, nearly a month after he had accepted the office, Impey knew nothing of any arrangement as to salary, though he obviously expected to have one.

On the <sup>2</sup> 22nd December, 1780, the proposal about

<sup>1</sup> The MSS. are drafts, and each draft seems to have served for several letters, passages being inserted which are to be put in some letters and left out in others.

<sup>2</sup> On December 3rd, 1780, Francis sailed from India. Impey's *Memoirs*, 221. It is singular that Mr. Merivale does not give the date of Francis's

salary, made in the Governor-General's minute of October 24th, was adopted by the Council; the salary to be paid from the date of the appointment.

In <sup>1</sup> April, 1781, Impey wrote a letter to Thurlow in which he says: "In January last the Governor-General and Council settled the establishment of the Judge of the Sudder Diwani Adalat at Rs. 5000 per month. This I have received, but shall be ready to refund it if you or any of His Majesty's Ministers shall intimate to me that it is improper I should retain it."

<sup>2</sup> "On July 4th, 1781, Impey addressed a letter to the Council, saying that he should decline appropriating to himself any part of the salary annexed to the office of Judge of the Sudder Diwani Adalat till the pleasure of the Lord Chancellor should be known," and at the same time he transmitted to them the Code of Regulations which he had prepared.

Late in 1781 the East India Company consulted their counsel, Dunning, Wallace, Mansfield, and Rous, on the legality of the appointment. The case stated the "Company's last advices do not inform them what has been done upon this last motion" [the Governor-General's minute about salary of October 24th, 1780], "but it is not doubted that a considerable salary has been annexed to the office of Judge of the Adalat." Dunning, Wallace and Mansfield gave a short opinion that the "appointment does not appear to us to be illegal either as being con-

leaving India, see II. 202, all his dates, however, are consistent with the one given by Impey the younger. Francis reached St. Helena on March 12, 1781, was kept there waiting for convoy four months, and reached Dover at 4 A.M. on October 19, exactly seven years after his arrival at Calcutta.

<sup>1</sup> Impey MSS. vol. ii. f. 40.

<sup>2</sup> Impey's *Memoirs*, 222. Quoting Bengal Consultations.

"trary to the 13 Geo. III, or incompatible with his duty as "Chief Justice." Rous was of the contrary opinion. He considered the appointment with a salary at the pleasure of the Council inconsistent with the object and intention of the Legislature in passing the Regulating Act, and Mansfield retracted his first opinion three days after giving it and came over to the view taken by Rous.

<sup>1</sup> On January 15th, 1782, a motion was made in the Court of Directors at the India House for Impey's removal from the office of judge of the Sudder Diwani Adalat. The votes being equal, lots were drawn according to the then practice, and the lot was in the negative.

<sup>2</sup> On April 30th, 1782, the Court of Directors voted that the Chief Justice should be removed on the receipt of their letter.

<sup>3</sup> On May 3rd, 1782, the House of Commons addressed the Crown to recall Impey to answer the charge of having accepted an office not agreeable to the true intent and meaning of 13 Geo. III. c. 63.

On July 8th, 1782, Lord Shelborne wrote Impey a letter "to signify His Majesty's command that you "should take the earliest opportunity consistent with the "necessary arrangement of your affairs, to return to this "kingdom for the purpose of answering the charge "specified in the address" of the House of Commons. In the Consultations for November 15th, 1782, is entered <sup>4</sup> a letter from Impey. He complains that Francis had accused him of compromising the dispute between the Court and the Council by accepting an

<sup>1</sup> Reports of Committees, v. app. 2.

<sup>2</sup> Impey's *Memoirs*, 280.

<sup>3</sup> *Ibid.*

<sup>4</sup> The letter is printed in Impey's *Memoirs*, p. 264-266, but I think the date given is wrong.

office with a salary. He energetically protested against the accusation, saying that he had given the Governor the most explicit notice that this acceptance of the new office would not affect his conduct as to the matters in dispute between the Court and the Council. He appealed to Hastings for confirmation of this. He added that he did not conceive that the acceptance of a salaried office by him was opposed to the Regulating Act as Sir John Clavering and Colonel Monson had each been "appointed "openly by the East India Company Commanders of the "Forces in India with considerable salaries," after the passing of the Act which applied as much to them as to him. He added that Sir Robert Chambers had accepted the office of Chief Justice of Chinsurah (this was on its conquest from the Dutch) with a salary. As to the salary he referred the Council to his previous letter of July 6th. Hastings recorded a minute in which he said that he did not remember in detail what had passed between Impey and himself, but that he thought Impey's account probable, and he stated that his leading motive in the arrangement he had made, was to put the Provincial Courts under the superintendence and instruction of the Chief Justice of the Court, and so to avoid complaints against them to the Supreme Court. He added with an openness which is creditable to him, "I will not deny "that I was pleased with an opportunity of being the "instrument of placing in a conspicuous and creditable "position of this service, and I may add profitable, a man "for whom I entertained a sincere friendship founded on "a knowledge of his personal virtues and an acquaint- "ance of more than thirty years." After several other letters it appears that on November 16th, Impey formally made over charge of his office to the Council.



These, as far as I have been able to ascertain them, are the facts of the only charge against Impey, except the one relating to Nuncomar, which reflects on his moral character. Abridged to the utmost they are as follows in order of time, the observation of which is essential to their due appreciation.

In January, 1780, the process of the Court was practically confined by armed force to Calcutta. In March the new arrangements as to the Adalats were made, the old appellate system being retained with slight, if any, modification. In September Hastings recorded his minute. Towards the end of October, Impey accepted the new office. On December 22nd a salary was affixed to it. Impey had notice of this in January, 1781. He wrote in April to Lord Thurlow and Wallace, then Attorney, and Solicitor-General, to say he had received the salary, but would not appropriate it to his own use till he heard from them that he might do so, and in July, 1781, he made a similar communication to the Council. In the end of 1781 and the beginning of 1782, the proceedings took place which ended in the letter of recall dated in July, 1782. He held the office till November, 1782, and then made over charge of it to the Council. Whether he actually did refund the amount received does not appear, neither does it appear whether Thurlow or any other minister ever gave him the opinion as to the propriety of his doing so for which he asked.

Friends of mine at the India Office have made every inquiry and search on these points, but have failed to discover anything material. The only fact which throws the faintest light upon the subject is that the article of the impeachment, which relates to this matter, does not allege that Impey ever received the salary voted to him. As

he did clearly receive it, and as the question is whether he refunded it, this is not of much importance.

What is the true view of this transaction? In order to appreciate it fairly, it is necessary to take into account a variety of matters which have never, I think, been considered impartially; and first, it is necessary to consider what precisely was the nature of the quarrel between the Council and the Court, and how it was affected by the appointment of Impey to be Judge of the Sudder Diwani Adalat. There were, as appears from the previous chapters, three main heads of difference between the Council and the Court. They were, first, the claims of the Court to exercise jurisdiction over the whole native population, to the extent of making them plead to the jurisdiction if a writ was served upon them. This was often, though incorrectly, described as a claim on the part of the Court to jurisdiction over zemindars as such. This claim the Council had, in the Cossijurah cause, met by armed force. The matter had been referred to England, and, as Impey says in one of his letters, answers had been received in the latter part of 1780 to the despatches which carried home that news, in which no disapproval had been expressed of the course taken by the Council. Upon this matter accordingly the contest had, in October, 1780, practically ended in the victory of the Council and the defeat of the Court.

The second question between the Council and the Court was as to the jurisdiction of the Court over the English and native officers of the Company employed in the collection of the revenue for corrupt or oppressive acts done by them in their official capacity. The Company were much dissatisfied with the powers which the

Court exercised in this matter, but they never interfered with them by force or declared them to be illegal. Indeed they could not have done so without contradicting the express provisions of the Regulating Act.

The third question was as to the right of the Supreme Court to try actions against the judicial officers of the Company, like the Patna Cause, for acts done in the execution of what they believed, or said they believed, to be their legal duty. In this matter the legality of the course taken by the Court was not denied. As I have shown in my account of the Patna Cause, it was afterwards emphatically admitted. Hastings and the Council knew in what a wretched state the country courts then were, and they determined, if possible, to improve them. They tried to do so by the new arrangement made in March, 1780, but its failure became apparent by October. Their position was this: the judicial officers of the Company were beyond all controversy liable to the jurisdiction of the Supreme Court. The Cazi and Muftis in the Patna Cause had not even pleaded to the jurisdiction. New actions as scandalous as the Patna Cause might be brought at any moment. This was the point of the quarrel between the Court and the Council, which was affected by Impey's appointment to be judge of the Sudder Diwani Adalat. It was affected, as it appears to me, not by a surrender of the claims of the Court, but by the establishment of an institution which would take away the necessity, for such actions as the Patna Cause, by giving the persons aggrieved a better and more effectual remedy. "Establish," said Hastings in effect, "a proper system of superintendence over the Diwani Courts, give them regulations by which their operations may be properly conducted, and make the appeal

“from their decisions a reality, and the scandalous  
“state of things brought to light by the Patna  
“Cause will be ended, and we shall have no more  
“Patna Causes.”

Thus of the three causes of quarrel between the Council and the Court, the one relating to the general jurisdiction of the Court over the natives was closed by armed force; the one relating to the oppressions of the revenue officers was left untouched; the one illustrated by the Patna Cause was in the main removed by the appointment of Impey to the judgeship of the Sudder Diwani Adalat.

This statement of the matter shows that after the establishment of the Sudder Diwani Adalat cases of various kinds might come before Impey as Chief Justice of the Supreme Court, by which the interests of the Company might be seriously affected. Such, for instance, would be actions against the local councils for oppressions in collecting the revenues. It was less likely that actions should be brought against the Zemindars as such after the Cossijurah case, and unlikely that actions should be brought against local judicial officers, but it could not be said to be impossible. As soon, therefore, as Impey accepted the position of a servant to the Company, holding office at their pleasure, he did undoubtedly weaken, if it is too much to say that he forfeited, his judicial independence as Chief Justice of the Supreme Court. He exposed himself to a temptation to which no judge ought to expose himself. He put it in the power of every suitor dissatisfied with his decisions to say they were not unbiased by his relation to the Company, and this I think was wrong, though I do not think it was actually corrupt. I do not think, that is, that there was

any tacit understanding between Hastings and Impey, that Impey should alter his judicial conduct in consequence of his appointment. I think they both regarded the arrangement made as one which, on public grounds, was highly desirable; but I also think that they overlooked the surpassing public importance of preserving the independence of the judges, and of avoiding anything which could excite a suspicion of it in any reasonable mind, and this the appointment of Impey to be judge of the Sudder Diwani Adalat, with a large salary to be held at the pleasure of the Company, could hardly fail to do.

The same could not, I think, be said of his acceptance of the office without the salary. If he had accepted the office, but refused to accept the salary, unless and until express sanction to his doing so was received from a competent authority in England, I think his conduct would have been free from all reproach, but he was not prepared to go this length. The facts already given show that from the first Impey expected the salary, and that he did actually receive it, though he said from the first that he would not appropriate it to his own use, if the English ministers objected. There are also passages in his letters which show that it was a matter of very great importance to him. In a letter to Dunning, written apparently in March, 1780, he says, "Our salaries are in arrear," and "when application is made for them the answer is that there is no money in the treasury." He adds that his health is <sup>1</sup> precarious,

<sup>1</sup> "I am once or twice a year subject to violent attacks of cholera morbus, here called the *mort de chien*, and to other disorders." This is an early instance of the mention of cholera, though Impey can hardly have had "violent attacks" of the disease which we know by that name once or twice a year for five years unless he was marvellously tough.

begs for leave of absence to regain it, and concludes, "but my finances are such that I must run all risks rather than resign my office. My having a seat in Council would not only forward my return, but I am sure would be of public utility." He had a large and increasing family. His son, the author of the memoirs, was born in India, in 1780. In a letter dated 16th August, 1780, Impey says, "Though I live with the greatest attention to economy, which is sharpened by my wish to return to my family and friends, so many contingent expenses for sickness and other causes continually arise that I have not been able to lay up more than £3000 in any year." If he had laid up £3000 a year from 1774 to 1780, his savings soon after he wrote this letter, and at the date of the appointment, would have been only £18,000 or say with interest £20,000; at the same rate they would in 1782 stand at £26,000. <sup>1</sup> The judgeship was Rs.5000 a month, which taking the sicca rupee at 2s. 2d. would be £6500. The whole of this Impey would be able to save, and in two years it would amount to £13,000, which would by the end of 1782 make to his savings the difference between £26,000 and £39,000. Under such circumstances it would be silly to doubt that the salary was an object of the first importance to him. It might, in fact, make the difference to him between ease and narrow circumstances on his return home. He knew he ought not to take it.

<sup>1</sup> Besides there was an allowance of Rs. 600 a month, or say £720 a year, for an office. This James Mill (iv. 240) treats as an addition to the salary, "under the denomination of rent for an office." In a memorandum Impey says this money "has been applied to the purpose for which it was appropriated by the officer who received it, without any interference of mine other than the official signing of the draft for the receipt of it."

He could not bear to put it out of his power. He took a middle course, which certainly does not wholly justify his conduct, but which sets it in a wholly different light from that in which it would otherwise have stood. If he had simply accepted the salary, I should have regarded his conduct as improper and a justification for his recall, though I should not have described it as corrupt and I cannot say that it was actually illegal, for the Regulating Act cannot be said to forbid it in terms. If he had refused the salary, either absolutely or till the express sanction of the English ministry for the whole measure was received, I should have said his conduct was fully justified. The course which he actually took appears to me not to amount to an absolute justification of his conduct, but in a great measure to excuse it. It entitles him to the full benefit of the remark that in what he did genuine public spirit was a concurrent motive with the desire to increase his savings.

In order to understand the force of this, it is to be said that apart from questions personal to Impey there is every reason to think that the step which Hastings took in this matter was eminently wise and useful, and was indeed the only practicable way out of the unhappy quarrel into which the Court and the Council had been drawn by rash and ignorant English legislation. The state of things brought to light by the Patna Cause was one for which, as I have already pointed out, the true and only possible remedy was a stringent system of supervision and appeal combined with legislation specially adapted to the wants of the country and the people. The adoption and development of this system has made the Indian Courts and Indian law what they now are, and though there are great defects in the system, defects inseparable from the nature of the Indian Empire, no

one who is at all acquainted with the subject will deny to it conspicuous merits. Of this system Hastings laid the foundation by the appointment in question, and it is remarkable that his idea of putting the Chief Justice of the Supreme Court at the head of it, though laid aside for a considerable time in consequence of the objections to it which I have already stated, was long afterwards resumed and acted upon by the Government with the happiest effect. Impey, under the appointment which Macaulay has stigmatised as I shall show immediately, ignorantly and unjustly, performed the very same functions as Macaulay himself performed, when, more than fifty years afterwards, he drew the Penal Code. He also performed the same functions as Parliament intrusted in 1861 to the Supreme Court when, by the High Courts Act, the Supreme Court was amalgamated with the Sudder Diwani Adalat and formed the present High Court. Hastings, in short, foresaw and laid the foundation of the policy by which Indian legislation was put under the direction of the Legal Member of Council, and by which the superintendence of the Mofussil Courts and an appellate jurisdiction over them were vested in the High Court. It would, I believe, have been well for India if that policy had been adhered to instead of being postponed as to part for fifty, and as to the rest for nearly eighty years.

The Governor-General and Council, the nominal Court of Appeal, were utterly unable to discharge their duties, and made over what little they affected to do to the Superintendent of the Khalsa or native Exchequer. The duty was one which no one could discharge properly except a lawyer of experience and energy, and Impey was the only available person who answered that description, and between whom and



the Supreme Court a clashing of jurisdiction was not to be feared.

There were no doubt great objections to the measure. Its legality was doubtful. It put Impey to some extent in a false position, but it was the only way in which it was possible to lay the foundation of anything like a regular and efficient administration of justice in India. As to its legality I may just observe that the legislative powers of the Governor-General and Council at this time were derived, if they existed at all, from the indirect recognition in the Regulating Act of the powers which the East India Company had obtained from the Great Mogul and the Subadar of Bengal, who no doubt might if they pleased have legislated, but this power was doubtful to an extreme degree. The whole transaction appears to me to be one which should be judged of rather by its general expediency and the good faith of the parties than by its correctness according to English law, which in truth provided little more than materials for declamation and recrimination upon constitutional questions arising in India.

One or two points in the scheme require explanation. Francis inveighed against the union of the powers of a Board of Superintendence with those of a Court of Appeal. Superintendence was in fact as urgently wanted as appeal, if not more urgently. Laziness, laxity, impatience and want of method are the faults of which young and inexperienced men, who are made judges without the least tincture of legal knowledge in huge districts of which they know the language imperfectly, are most likely to be guilty. Even now an Indian judge is subject to infinitely less stringent criticism from the pleaders and the newspapers than an

English judge. In Hastings's time and long afterwards he was under absolutely no such checks.

As matters now stand he has to account to the High Court for practically the whole employment of his time. He makes returns as to the number of cases he has disposed of, the amount of his arrears and many other particulars. Officers are provided in every High Court who examine these returns, and bring to the attention of the Court anything at all peculiar which presents itself in them. The papers may be called for in any particular case, explanations required, and reproofs administered if any sort of irregularity or impropriety is detected. This system appears from Hastings's minute to have been as old as the institution of the Sudder Diwani Adalat, though it also appears not to have been practised. Impey appears from several passages in his correspondence to have discharged that duty, though of course he cannot have discharged it in anything like the elaborate (possibly over-elaborate) way in which it is discharged at present.

Impey's correspondence is full of assertions that in this matter he was actuated by public spirit, and I have no doubt that this was true. In India work is the one pleasure of life. To be substantially the lawgiver for a great empire, to stand at the head of a great system for the administration of justice, and to try to make it answer the purpose for which it was designed, were objects which would naturally affect the imagination and stimulate the ambition of any man who had the opportunity of attaining them. My own experience has enabled me to enter more fully into Impey's feelings on this matter than almost any one else, though Lord Macaulay, strangely enough, had the same experience.

Each of us in our turn, he at an interval of fifty-two and I at an interval of eighty-seven years, had to discharge some of the most characteristic and important of the functions conferred on Impey by Hastings.

There are many expressions in Impey's letters which show how strongly he felt the attraction of duties supremely attractive to an energetic, ambitious man, whether paid for them or not. Being in India, I think it probable that, if requested to do so, Impey would have taken the office without a salary. As it was, he took it taking the chance of not being paid at all in the first instance, and announcing his readiness afterwards to return his salary.

The following passage in a letter to Dunning, dated 1st November, 1782, appears to me both sincere and affecting. He could not have written it if when he wrote it he knew that he had in his pocket nearly £13,000 produced by his salary. "This is real truth. "I have undergone great fatigue, compiled a laborious "code, restored confidence to the suitors and justice and "regularity to the courts of justice, and settled the "internal quiet of a great empire, without any reward, "and for my recompense shall have lost my office, reputation, and peace of mind for ever."

Whatever may have been his motives, his acts speak for themselves. In the course of the eight months between the end of October, 1780, and July, 1781, Impey prepared a set of judicial regulations, which formed a new code of procedure, founded on the earlier regulations and including many new ones, which he proposed for adoption. He was thus the first of Indian codifiers, for which reason, amongst others, his successor might have had a little mercy upon him. The Regu-

lations of 1781 are now hard to find, but there is a copy at the India Office Library. Impey's code is Regulation VI. of 1781. It consists of ninety-five sections, which fill thirty-eight folio pages, and repeals all other regulations then in force relating to civil procedure. It is not a work of genius like Macaulay's Penal Code, and the length and elaboration of its sentences would jar upon modern Indian draftsmen, but it is written in vigorous, manly English, and is well arranged. It gives the effect of some regulations which were passed in 1780 and the earlier part of 1781, by which <sup>1</sup>eighteen Courts were established, in each of which except four was a judge independent of the revenue authorities. In four the collector was to be judge. The Regulation defines the local jurisdiction of the Courts and their jurisdiction over causes. It provides for the limitation of suits, giving in most cases a term of twelve years. It lays down a system of procedure which contains a greatly simplified version of the old English special pleading. It provides for the mode of trial, and contains regulations as to arbitrations and appeals, besides many other matters. It remained in force for six years, when it was repealed, but re-enacted, with amendments and additions, by Regulation VIII. of 1787.

From much experience of such work I am inclined to think that the preparation of such a regulation between October 1780 and July 1781 would fill up pretty fairly a good deal of the leisure left to a judge whose Court appears to have risen habitually at 1 p.m., and who had

<sup>1</sup> Midnapore, \* Chibrah, Patna, Durbungah, Tanjepore, \* Boglepore, \* Rungpore, Nattore, Dacca, Backergunge, \* Islamabad (Chittagong), Morely, Burdwan, Calcutta, Murshedabad, Masey, Rajepaut, Sultanoë. In those marked with a \* the collector was to be judge

other duties as well, but I do not think it would require any extraordinary effort. I should doubt, however, whether any one else then in India, except possibly Chambers, could have done it. It must have been an immense comfort and excellent guide to the new judges.

Macaulay's account of the quarrel between the Court and the Council deserves to be carefully noticed. It supplies a strong instance of the danger of breaking down the boundary between history and romance. It is of course admirably written—short, bright, striking, and entirely free from Indian names or other non-conductors of sympathy. It says not a word of the Patna Cause, the Cossijurah Cause, or Touchet's petition. It does not even mention the Sudder Diwani Adalat or give a word of explanation as to the nature of the office to which Hastings appointed Impey. It is a gloomy picture of horrible oppression, causeless, purposeless, mysterious, and yet so tremendous that it almost justified the course taken by Hastings of buying off by an enormous bribe the infamous tyrant by whom it was carried on. The objection to it is that it is absolutely false from end to end, and in almost every particular, as the following instances will show.

After stating truly that arrest on mesne process was the first step in most civil proceedings, he expatiates on its abuses. He says at great length that to a native woman of rank it is an intolerable outrage that her apartment should be entered by strange men. He then adds: "To these outrages the most distinguished families of Bengal, Behar, and Orissa were now exposed;" and he says that the "effect of the attempt which the Supreme Court made to extend its jurisdiction over the whole of the Company's territories" was like an

attempt in England "to empower any one by merely "swearing that a debt was due to him, to horsewhip a "general officer, to put a bishop in the stocks, to treat "ladies in the way which called forth the blow of "Wat Tyler." He then goes on as follows: "A reign "of terror began, of terror heightened by mystery, for "even what was endured was less horrible than that "which was anticipated. No man knew what was next "to be anticipated from this strange tribunal. It came "from beyond the black water, as the people of India "with mysterious horror call the sea. It consisted of "judges not one of whom was familiar with the ways "of the millions over whom they claimed boundless "authority. Its records were kept in unknown characters. "Its sentences were pronounced in unknown words."

The general answer to all this is that the Supreme Court never did claim any such general jurisdiction as is alleged. Practically, the most important of its claims was jurisdiction over the collectors of the revenue and officers of the Provincial Courts, as being servants to the Company. I have diligently read from end to end the whole Report of Touchet's Committee and every paper in each of its four appendices, and I affirm that it contains no evidence at all of any such "reign of terror" as Lord Macaulay imagined. The nature of the jurisdiction claimed by the Court protected women from being sued before it. They could not be servants to the Company. The only writ against a woman was the writ against Naderah Begum, and that was in the Provincial Court at Patna, and not in the Supreme Court. How far zenanas were incidentally trespassed upon, I will examine immediately.

To pass to the details. What sense is there in the

language about the black water and the strange characters? Did not Hastings and the East India Company come from beyond the sea as well as the judges? Were not most of the records of the Company kept, and most of their orders given, in English, like those of the Supreme Court? When and where did the Supreme Court claim boundless authority over the natives? Its claims were quite distinct, but they cannot be stated in a picturesque way.

"No Mahratta invasion had ever spread through the province such dismay as this inroad of English lawyers. All the injustice of former oppressors, Asiatic and European, appeared as a blessing when compared with the justice of the Supreme Court."

In 1779 the Mahrattas had been kept out of Bengal for a considerable time, but <sup>1</sup>from 1742 to 1750 "these merciless hordes of miscreants devastated the country to the southward of the Ganges from October till June to extort their 'chout.'" One incident of these invasions may be mentioned to show how far Macaulay's statement is just. The then Nabob Aliverdy Khan treacherously murdered many of their chiefs. Thereupon "the Mahratta army wreaked their vengeance upon the unoffending inhabitants. They ravaged the country with fire and sword, cutting off ears, noses, and hands, and committing countless barbarities in the search of spoil. The wretched Bengalis fled in shoals across the Ganges to take refuge or perchance to perish in the hills and jungles to the northward of the river." What did the Supreme Court ever do remotely comparable to this? How many imprisonments on mesne process would it take to create more terror than the mutilation,

<sup>1</sup> Talboys Wheeler, p. 267.

torture, and robbery of hundreds, perhaps thousands, of innocent peasants ?

To come to something more specific. "There were instances in which men of the most venerable dignity, persecuted without a cause by extortioners, died of rage and shame in the gripe of the vile alguazils of "Impey."

The only matter to which this can refer is the case of the Cazi Sadhi. He was one of the defendants in the Patna Cause, and was taken in execution after bail had been given for him by the Company. He died on a boat on the Ganges on his way to Calcutta whilst under a guard of Sepoys. He may have been hardly dealt with, but to say that he was persecuted by extortioners without a cause is to allege that the judgment in the Patna case was wrong, and of this judgment Macaulay takes no notice at all. The Cazi was sued for gross oppression and corruption, which the Court upon an elaborate inquiry thought he had committed.

Macaulay does not suggest that there was even a question on the subject. I am confident he knew nothing of the Patna Cause, except what he read in Mill, who misled him. At all events, the Sepoys who had charge of the boat in which the Cazi died were not the "vile alguazils of Impey" or officers of the Supreme Court at all. They were a guard put over him by the Dacca Council, which had given bail for him, and which was specially directed to treat him as kindly as might be, which it was anxious to do.

Here we see one cazi turned into an indefinite number of "men of the most venerable dignity;" a man found guilty by legal process of corruptly oppressing a helpless widow into men of most venerable dignity persecuted



by extortioners without a cause ; and a guard of sepoy, with which the Supreme Court had nothing to do, into " vile <sup>1</sup> alguazils of Impey."

This indefinite way of writing " there were instances " is singularly unfair and inaccurate. Here is another instance of it :—

" The harems of noble Mohammedans, sanctuaries " respected in the East by governments which respected " nothing else, were burst upon by gangs of bailiffs, and " there were instances in which they shed their blood in " the doorway while defending, sword in hand, the sacred " apartments of their women."

I have carefully gone through the whole of the evidence in the report and appendices referred to, in order to test the truth of these eloquent generalities, and I find as follows :—

<sup>2</sup> There was one instance in which one Mohammedan of some rank thought that his friend's zenana was likely to be broken open, and stood in the doorway sword in hand to defend it. The house, not the zenana, was broken open, and a fray took place in it, in which the father of the Mohammedan in question was endangered. The son left his position in the passage to

<sup>1</sup> The word " alguazil " is, of course, used to give the bailiffs of the Supreme Court a kind of flavour of the Inquisition. It is a singularly infelicitous expression, though, oddly enough, it has an Eastern origin. " Alguazil " is " al," the, and " guacir," the Spanish spelling of the Arabic word which we know as vizier. In Spanish it means—as constable does in English—the highest and also the lowest officer of justice. See the *Dictionary of the Spanish Academy*, " alguacil " and *Littre* " alguazil."

<sup>2</sup> See the *Dacca Appendix*. In this case Macaulay was misled by Mill (iv. 236), who had read the papers in the *Dacca Appendix*, and artfully gave an account of them not literally false, but so arranged as to produce the exact false impression which Macaulay received, generalised, and made popular.

the zenana, took part in the fray, and was hurt. It does not appear that the zenana was broken open, or that any attempt to do so was made.

There is some though not much foundation for the introductory part of the statement. <sup>1</sup> One zenana was broken into by a bailiff, and a slave girl was wounded, and the Advocate-General suggested that the matter should be laid before the Court, which would, if applied to, punish the bailiff. <sup>2</sup> The Rajah of Cossijurah's zenana is said to have been entered, but no detail is given.

Upon these three cases, and no other materials which I can discover, is founded all the eloquence about Wat Tyler, a reign of terror, and the cruel humiliation of all the nobility of Bengal.

This way of generalising particular incidents is bad enough, but the following passage is, I think, worse.

"The Government placed itself firmly between the "tyrannical tribunal and the people. The Chief-Justice "proceeded to the wildest excesses. The Governor-General and all the members of Council were served "with writs calling on them to appear before the King's "justices and to answer for their public acts. This was "too much. Hastings, with just scorn, refused to obey "the call, set at liberty the persons wrongfully detained "by the Court and took measures for resisting the "outrageous proceedings of the sheriff's officers, if necessary, by the sword."

This passage implies that Impey individually caused the Governor and the members of Council to be "served with writs." Neither Impey nor the Supreme Court did anything of the kind. <sup>3</sup> They expressly refused to

<sup>1</sup> General Appendix, No. 20.

<sup>2</sup> Cossijurah, Appendix, No. 7.

<sup>3</sup> *Ibid.* No. 19.

issue an attachment against the Governor or the Councillors, because they were by the Regulating Act exempt from the criminal jurisdiction of the Court. <sup>1</sup> The writs with which Hastings and the Council were served were writs issued by Cossinauth, the plaintiff in the action against the Rajah of Cossijurah, for preventing him by armed force from compelling the Rajah's appearance. Neither Impey nor the Court had any right to refuse to issue a writ on such a claim.

The passage as to Hastings's "just scorn" at being sued for his public acts is remarkable. Surely it is one of the fundamental principles of English law that a man who holds a public office is liable to an action for abusing its powers. That Macaulay of all men should deny this is wonderful.

It is not true that any one arrested by the Court justly or not, in this matter was set at liberty by the Council. One person only—Naylor, the Rajah of Cossijurah's attorney—was imprisoned, and that was for contempt in not answering interrogatories. <sup>2</sup> The Council never set him at liberty. They authorised him to answer the interrogatories in order to regain his liberty.

The climax of injustice is, I think, reached in the passage which follows the one just noticed. After saying that Hastings "took measures for resisting the outrageous "proceedings of the sheriff's officers, if necessary by "the sword," Macaulay adds: "But he had in view "another device, which might prevent the necessity of an "appeal to arms. He was seldom at a loss for an expedient, and he knew Impey well. The expedient in

<sup>1</sup> A copy of the plaint is printed in Cossijurah, Appendix, No. 22, and see No. 24.

<sup>2</sup> Cossijurah, Appendix, No. 23.

“ this case was a very simple one—neither more nor less than a bribe. Impey was by Act of Parliament a judge independent of the Government of Bengal, and entitled to a salary of 8,000*l.* a year. Hastings proposed to make him also a judge in the Company’s service, and to give him in that capacity about 8,000*l.* a year more. It was understood that in consequence of this new salary Impey would desist from urging the high pretensions of his Court. If he did urge those pretensions, the Government could at a moment’s notice eject him from the office which had been created for him. The bargain was struck ; Bengal was saved ; an appeal to force was averted. The Chief Justice was rich, quiet, and infamous.”

This charge is inconsistent with the dates, and asserts imaginary facts. No appeal to force was averted. On the contrary, such an appeal was made. The sheriff’s officers actually were resisted and taken prisoners by two companies of sepoys in January, 1780. Impey never did desist from urging the high pretensions of the Court. The Council, by military force, restrained the jurisdiction of the Court, and by a proclamation to all the natives informed them that they were at liberty to set its process at defiance. No bargain was struck. The Council and the Court respectively had done their very worst by each other nine months at least before any sort of offer was or could be made to Impey. Moreover, the Court was powerless to do anything unless it was set in motion by a suitor, but after the course taken in the Cossijurah Cause, who would venture to sue any one whom the Council had taken under its protection ? The plaintiff could not serve his writ. He could not execute his judgment if he got one. Nor

was any redress to be had against the individuals by whom he was prevented from exercising his legal rights. The Governor-General and his Council had committed themselves to a forcible resistance to any attempt to make themselves or their inferior agents liable in damages to any one who suffered by their interference. This conduct was persisted in, and was never modified in the smallest degree. In that state of things it is difficult to see what the Court had to give for which it was worth the Council's while to offer a bribe. Hastings wanted nothing from Impey. There was nothing to be got from him except an admission that the Council had been right in their difference and the Court wrong, and this Hastings did not ask for, did not get, and did not want. If he had got it, it would have been useless.

## CHAPTER XVI.

### THE LUCKNOW AFFIDAVITS.

THE last charge in the articles of impeachment against Impey related to the taking of certain affidavits. The charge is as verbose and declamatory as the others, though it fills only two large folio pages. The effect of it is that Impey conspired with Hastings to plunder two princesses called the Begums of Oudh, and that, without any legal authority, he, in aid of that conspiracy, took certain depositions and affidavits intended to his knowledge to be used by Hastings as "the foundation or pretext for seizing "the effects and treasures of the said princesses."

This accusation is connected with the two charges against Warren Hastings called the Benares charge and the Begum charge.

I cannot go into either of them in this place, though they would form an important part of a history of the impeachment of Hastings. The leading facts relating to them were these :—

<sup>1</sup> On July 7th, 1781, Hastings left Calcutta on a journey to Benares, one of the objects of which was to compel

<sup>1</sup> *Narrative*, p. 1. I take Hastings's *Narrative*, published at Calcutta in 1782, and much referred to on his impeachment, as the authority for this paragraph. The truth of its main statements is common ground.

Cheyte Sing, the Rajah of Benares, to pay a large sum of money to the Company and to render military aid, which Hastings alleged to be due from him. Hastings arrived at Benares on the <sup>1</sup>14th August, and there met and conferred with Cheyte Sing, upon whom he made demands with which Cheyte Sing did not comply. On the 15th Hastings put Cheyte Sing under arrest, placing upon him a guard of two companies of Sepoys. The Sepoy guard was attacked by an armed mob and destroyed, and Cheyte Sing made his escape. Hastings alleged that this led to an insurrection throughout Cheyte Sing's dominions. <sup>2</sup> A considerable force collected at Ramnagur, and on the 20th August inflicted another defeat on certain Sepoys, who attacked them imprudently. <sup>3</sup> Hastings upon this retired from Benares to the fort of Chunar, and, <sup>4</sup> as he alleged (though this was afterwards disputed) the insurrection extended to the territories of the Begums of Oudh, the mother and grandmother of the Nabob Vizier, or ruler of Oudh, and was promoted by them. Hastings remained at Chunar for some weeks, in the course of which the <sup>5</sup> Nabob Vizier of Oudh arrived. <sup>6</sup> Whilst he was there military operations were carried on against Cheyte Sing, which were nearly ended by September 21, <sup>7</sup> though the fortress of Bidjehur, his chief stronghold, was not surrendered till November 10th.

<sup>8</sup> In the meanwhile a treaty was made between Hastings and the Nabob Vizier, dated September 19th, 1781, by which, amongst other things, the Vizier was authorised to resume the Jagheers, especially those of the Begums.

<sup>1</sup> P. 15.<sup>2</sup> Pp. 29, 30.<sup>3</sup> Pp. 30-32.

Pp. 36, 37.

<sup>5</sup> P. 42.<sup>6</sup> Pp. 43-50.<sup>7</sup> P. 53.<sup>8</sup> App. Pat. i. p. 3, and see pp. 8, 9 for Hastings's remarks on the Begums.

Nothing appears on the face of the treaty about the treasure of the Begums. But it was alleged that Hastings strongly pressed the Nabob Vizier to pay a large balance due from him to the Company, and that the Vizier explained that he could do so only by extorting the Begum's treasure. It was further alleged that under this pressure treasure was extorted by cruel and oppressive proceedings, which began on January 12th, 1782, by the occupation of Fyzabad, where the Begums lived.

Of the events which took place between August 14th and the end of the negotiation with the Nabob Vizier, and the suppression of the alleged rebellion of Cheyte Sing, Hastings drew up the narrative to which I have referred. He observes that <sup>1</sup> it contains in effect but the history of one month. It consists of 57 4to pages, and is followed by an appendix divided into three parts—the first consisting of documents about Cheyte Sing, the treaty with the Nabob Vizier, and the establishments of Benares; the second of a long series of documents, orders, and correspondence relating to the claim on Cheyte Sing; and the third consisting of affidavits, the taking of which was the crime with which Impey was charged.

The whole history of these affidavits was gone into in the most minute detail upon the impeachment of Hastings. On May 6th, 1788, Impey was called as a witness, and was examined, or rather cross-examined (for he was treated as a hostile witness), for a long time, <sup>2</sup> apparently by Sheridan, in an offensive tone, and, I think, unfairly, as questions were put to him on documents

<sup>1</sup> P. 53.

<sup>2</sup> This is implied by a statement in the *History of the Trial*, i. p. 53, "Mr. Sheridan then read a passage," &c., and by references in Sheridan's



which he was not allowed to see, and as his answers appear to have been wilfully misunderstood and distorted. This was the more discreditable, because at the time the question whether Impey should or should not be impeached had not been decided by the House of Commons, so that the subject was one on which he might, had he chosen, have refused to answer at all. He did answer, however, with complete unreserve, and with a remarkable combination of prudence and spirit which gave him, as it appears to me, a complete triumph over Sheridan. The questions are asked in such a disjointed way, and with such a total neglect of the order of time, and are mixed up with such a multitude of paltry captious quibbles upon petty matters of detail, that it requires much patience to get from them a connected story in order of time. When properly studied, however, the matter is perfectly clear, and is as follows:—

<sup>1</sup> The Governor-General and Council having requested Impey to visit the Provincial Courts of Justice, he left Calcutta for that purpose <sup>2</sup> in July. At Monghyr (on the Ganges, <sup>3</sup> about eighty miles below Patna), he received news from Hastings of the disturbances at Benares, which took place on August 21st. He went on to Patna and stayed there some days “to give a confidence to the people,” who were much alarmed and were leaving the

speech on the Begum charge. The shorthand notes do not say by whom the questions were asked.

<sup>1</sup> Shorthand notes, p. 647. The evidence runs over thirty-two folio pages, from 622 to 651. The questions were asked so stupidly, or perhaps by design so confusedly, that the first matter referred to in order of time is the passage in the text at p. 647. The difficulty of getting this mass of matter into chronological order is some sort of palliation for the way in which James Mill has dealt with it.

<sup>2</sup> This date is taken from Impey's *Memoirs*, p. 238.

<sup>3</sup> P. 647.

place. He afterwards received further letters from Hastings saying that the country was quieted and pressing him to come up to Benares. On this he says:—  
“The last letter I received from Mr. Hastings informed  
“me that the country was quiet and pressed me to come  
“up, and every letter I received from Mr. Hastings was  
“more and more pressing to me to come up on account,  
“as I understood, of the exigencies in which he then was.  
“During the time I resided in Calcutta, as I held a very  
“high office, I did not think my duties to the State  
“always satisfied simply by the execution of my office.  
“If I could serve the State any otherwise I thought it  
“my duty to do it ; and there are many and many in-  
“stances in which I have done it. This is one of those  
“cases which I thought called on me, and for that reason  
“I attended Mr. Hastings at Benares, conceiving the  
“difficulty he was in was the reason of his calling me  
“there to consult with me what he should do ; and  
“though it is <sup>1</sup> thrown out as degrading to me bearing  
“the office of Chief Justice of Calcutta, that I con-  
“descended to be the private secretary and amanuensis  
“of Mr. Hastings, acting from the impressions I did I  
“felt it very differently. I felt that in the situation I  
“was in, it was a duty incumbent on me to give every  
“assistance I could to Mr. Hastings, and every assistance  
“to the State, and with that view I went up to Benares.”  
<sup>2</sup> He saw Hastings at Benares and was with him there some  
days. He adds <sup>3</sup> “Mr. Hastings acquainted me that he  
“was at that time writing a narrative of the proceedings  
“of the revolution at Benares. He acquainted me with

<sup>1</sup> This is in reference to the language of the article of impeachment against him.

<sup>2</sup> P. 622.

<sup>3</sup> P. 624.

“the main circumstances. I then told him that as he was a party so much engaged in the event, and the disposition of those in power at that time in England was not favourable to him, I doubted whether his single narrative would gain complete credit to the facts which he asserted; I therefore advised him to authenticate those facts as strongly as he possibly could. The only means of doing that that suggested themselves to me, were the having them verified by affidavit. He then asked how it was to be done, and demanded of me whether I would take such affidavits, to which I assented.”

It was at first proposed that Impey should go to Allahabad as a convenient place for the purpose, “but in the course of that conversation Mr. Hastings having described the Begums as being in actual rebellion, I told Mr. Hastings that if that was the fact I thought their intervention was an offence to the Government of the Nabob” (*i.e.*, of Oudh), “and that he had a most undoubted right of seizing the treasures of those persons who were employing them against his state. Mr. Hastings had told me that he thought the welfare of the country committed to his charge, and his own reputation depended upon the treaty of Chunar being carried strictly into execution; that he was apprehensive the mildness of Mr. Middleton’s temper would prevent him from urging the Nabob effectually to carry it into execution; he therefore proposed to me instead of going to Allahabad, where it was first intended, that I should go to Lucknow; and besides taking the affidavits I was to acquaint Mr. Middleton with the conversation which had passed between Mr. Hastings and me with regard to the Begums, and urge him to see the treaty

“of Chunar carried into execution. That was the occasion of my going to Lucknow. To Lucknow I should not have gone merely for the purpose of taking the affidavits, for that purpose I should have proceeded no further than Allahabad.”

From Benares Impey went first to Chunar and thence <sup>1</sup>with great expedition travelling night and day” to Lucknow by way of Allahabad. <sup>2</sup>He was met twenty miles from Lucknow by Middleton the Resident, who drove him into Lucknow, receiving his communication from Hastings on the way. <sup>3</sup>He stayed at Lucknow three days and took many affidavits there, after which he returned to Chunar. <sup>4</sup>Impey declared that he knew not how many affidavits he took, but there were “a great multitude.” Part of the affidavits were taken in “the house in which I lodged, the house of a <sup>5</sup>Colonel Martin; other parts were taken in the tent of Colonel Hannay with whom I had dined.” The deponents came voluntarily before him. <sup>6</sup>He did not read the affidavits or know their contents. He swore that he never read them even after they were published by Hastings in the appendix to his narrative. When they were taken he took them back to Hastings at Chunar, gave them to him and saw no more of them. <sup>7</sup>Being asked if he thought he had any jurisdiction to take the affidavits he said he had no pretence to act in a judicial capacity; but he simply wished to authenticate such documents as Hastings wished to have authenticated. The two questions and answers following put the matter in a very few words.

<sup>1</sup> P. 633.

<sup>2</sup> P. 625.

<sup>3</sup> P. 633.

<sup>4</sup> Pp. 625, 626.

<sup>5</sup> I suppose the well-known founder of the Martinière.

<sup>6</sup> Pp. 627-631.

<sup>7</sup> P. 639 and elsewhere.

<sup>1</sup> “ Q. In what character was you the simple instrument  
“ of authenticating them ?

“ A. In no official character whatever, but as a man  
“ known to bear a great office, and therefore it was  
“ supposed my taking the affidavits would give a weight  
“ to them.

“ Q. Whether or no you conceive that a man in a  
“ great office giving an attestation to affidavits which he  
“ never read and which were never read to him would  
“ give any weight <sup>2</sup> to any justification ?

“ A. I think it would give a weight to the only effect  
“ that I wished to have the weight given, namely to the  
“ fact that those affidavits had been sworn ; that was all  
“ I meant to authenticate, the fact of swearing.

“ <sup>3</sup> At the conclusion of his evidence,” says the historian  
of the trial, “ Sir Elijah Impey made use of the following  
“ words,” which his son quotes with just pride. “ It has  
“ been objected to me as a crime, my Lords, that I  
“ stepped out of my official line, in the business of the  
“ affidavits, that I acted as the Secretary of Mr. Hastings.  
“ I did do so. But I trust it is not in one solitary  
“ instance that I have done more than mere duty might  
“ require. The records of the East India Company ; the  
“ minutes of the House of Commons ; the recollection of  
“ various inhabitants of India—all, all, I trust will prove  
“ that I never have been wanting to what I held was the  
“ service of my country. I have stayed when personal  
“ safety might have whispered there is no occasion for  
“ your delay ! I have gone forth—when individual ease  
“ might have said ‘ stay at home ! ’ I have advised, when

<sup>1</sup> P. 639.

<sup>2</sup> This has very little meaning.

<sup>3</sup> *History of the Trial of Hastings*, i. 53. The passage is not in the shorthand notes, but much resembles the passage quoted above, p. 260.

"I might coldly have denied my advice. But, I thank God, recollection does not raise a blush at the part I took; and what I then did, I am not now ashamed to mention."

His spirit and decision appear to have made a great impression on the house. The author just quoted concludes his account of the matter thus:—"At half-past five the managers seemed to think they had heard enough of Sir Elijah." He was not called again.

Before I proceed to my own observations on this matter I must add a few facts from the Appendix to Hastings's narrative. The total number of affidavits sworn was forty-three.

They may be classified as follows:—

Sworn in Persian, of which sworn translations, verified upon oath by Captain Davy, the Persian translator to Hastings, are published in the Appendix . . . . .	19
Sworn in Hindustani, from which a sworn Persian translation was translated into English by Captain Davy, each translator being sworn . .	1
Sworn in English by natives to whom the affidavits were previously explained in their own language by Captain Davy, the language declared to be Hindustani in two cases and being probably Hindustani in the other four . . . . .	6
Sworn in English by Englishmen before Impey. .	10
Affidavits in English by Captain Davy verifying translations, &c. . . . .	6
Sworn in French by a Frenchman . . . . .	1

The criticisms made upon this transaction both at the time and afterwards make it necessary to state two matters which are so familiar to every lawyer that I cannot understand how the managers of the impeachment of Hastings and those who tried to get Impey impeached could successfully affect ignorance of them.

The first is that in the common course of business when an affidavit is sworn, even in a judicial proceeding, the person before whom it is sworn never knows its contents. He has as little to do with it as the attesting witness of a will or deed has to do with the contents of the document which he attests. To blame a man for swearing an affidavit in a language of which the person before whom it is sworn is ignorant, is as absurd as to blame a man for witnessing a will written in a language which he does not know. All that the judge or <sup>1</sup> commissioner has to do is to satisfy himself that the deponent swears that the contents of his affidavit, whatever they may be, are true. All that he need know of the deponent's language is enough of it to ask him if the matter of his affidavit is true and to give him the oath. Persian, and perhaps Hindustani, were all that was required for this purpose in regard of these affidavits, and Impey <sup>2</sup> said before the House of Lords, "I understood the Hindustani language "much more than for such a purpose, both Hindustani "and Persian much more than for such a purpose."<sup>3</sup> Mr. Shakspeare, the Chief of Dacca, said that he had heard Impey "speak with some fluency both in Persian and in

<sup>1</sup> Affidavits are now sworn almost always before Commissioners. The first judicial act I ever performed was to swear Lord Justice Lush to an affidavit. What it was about I have not, and never had, the faintest idea. I do not recollect that any other affidavit was ever sworn before me.

<sup>2</sup> Shorthand notes, p. 646.

<sup>3</sup> Reports of Committees, v. 395.

“Moors” (Hindustani). He thus needed no interpreter for the task he had undertaken, and, as regarded the Persian affidavits, used none.

The second fact to be mentioned is that till the year 1835, when the 5 and 6 Will. IV. c. 62 was passed, the taking of voluntary affidavits, not in any judicial proceedings, but for the purpose of attesting matters of fact which any one wished to authenticate was very common. For instance Clavering, Monson and Francis, made an affidavit as I have already related, that they never had any intention to take Nuncomar out of custody by force. One of the letters of Impey already referred to incloses affidavits about a contract in which Francis maliciously suggested he had a corrupt interest. Such affidavits were in no sense judicial acts. They were not sworn in judicial proceedings. To commit perjury in them was not a crime, but merely a lie upon oath. They were usually sworn before magistrates to give them an appearance of importance, but any one whatever might swear such an affidavit with just as much legal effect as the Chief Justice of the Queen's Bench, and its legal effect was in no way dependent upon the place in which it was sworn. Impey's act in taking affidavits at Lucknow about the disturbances at Benares, had no greater and no less legal significance than his asking the deponents whether what they said was true would have had. As far as the law went <sup>1</sup>any private person might have administered the oath as well as he. His office and dignity no doubt put on record the fact that the oath was taken with more emphasis than Middleton or Hannay

<sup>1</sup> Two of the affidavits were sworn before Hastings who, however, was a justice of the peace. There was much discussion about voluntary affidavits on the trial of Lord Cochrane.



could have given to it, but an affidavit on such a matter sworn by either of them would be legally neither better nor worse than one sworn before Impey. I think indeed that the mere taking of the affidavits would not have been charged against him as an offence if it had not been regarded as an overt act of a conspiracy between him and Hastings to plunder the Begums. Any one who undertakes the wearisome task of reading through Impey's examination by Sheridan will, I think, see that this was the real gist of the charge against him. He will also see how conspicuously <sup>1</sup> Sheridan failed in his object, but this matter lies out of my present subject.

It seems to me that in this whole matter Impey at the very worst was a little officious, but willingness to take responsibility and to help the Governor-General in a difficulty, may also be described as a proof of courage and public spirit. What corrupt motive Impey had in his conduct in the matter no one has ever shown.

Macaulay in a very characteristic passage ascribes his conduct to love of wickedness pure and simple. His account of the matter is as follows:—

“But we must not forget to do justice to Sir Elijah Impey's conduct on this occasion. It was not indeed “easy for him to intrude himself into a business so “entirely alien from all his official duties. But there “was something inexpressibly alluring, we must suppose, “in the peculiar rankness of the infamy which was then “to be got at Lucknow. He hurried thither as fast as “relays of palanquin-bearers could carry him. A crowd “of people came before him with affidavits against the

<sup>1</sup> See, for instance, Sheridan's heavy and puerile wit about Impey in the speech on the Begum Charge, June 3rd, 1788 (*Speeches*, i. p. 548-555 and elsewhere).

"Begums, ready drawn in their hands. Those affidavits he did not read. Some of them indeed he could not read; for they were in the dialects of Northern India," [in the original review in October, 1841, it is in "Persian and Hindustani"] "and no interpreter was employed. He administered the oath to the deponents with all possible expedition, and asked not a single question, not even whether they had perused the statements to which they swore. This work performed, he got again into his palanquin and posted back to Calcutta, to be in time for the opening of term. The cause was one which, by his own confession, lay altogether out of his jurisdiction. Under the charter of justice, he had no more right to inquire into crimes committed by Asiatics in Oude than the Lord President of the Court of Session of Scotland to hold an assize at Exeter. He had no right to try the Begums, nor did he pretend to try them. With what object then, did he undertake so long a journey? Evidently in order that he might give, in an irregular manner, that sanction which in a regular manner he could not give, to the crimes of those who had recently hired him; and in order that a confused mass of testimony which he did not sift, which he did not even read, might acquire an authority not properly belonging to it, from the signature of the highest judicial functionary in India."

Every word of this is either incorrect or a proof of ignorance, both of the law and of the facts relative to the matter. I believe that Macaulay knew no more of it than is to be found in <sup>1</sup>James Mill, who has given an

<sup>1</sup> Vol. iv. 310, 311. One or two remarks in the passage from Macaulay suggest that he may have turned over the leaves of the shorthand report, though I doubt it.

account of the matter, on which his editor and continuer, Wilson, remarks : " As usual this is uncandidly stated, and " no regard had to Sir Elijah Impey's own account of the " transaction." I will shortly notice the mistakes :—

(1) The assertions as to Impey's motives are made in obvious ignorance of the facts stated by Impey as to Hastings's request that he should come to Benares. Macaulay seems, from the expression " back to Calcutta," to think that he " hurried " to Lucknow from Calcutta.

(2) It is not the fact that a crowd of people came before him with affidavits " against the Begums " ready drawn in their hands. Of the forty-three affidavits <sup>1</sup> ten only mention the Begums, and that slightly and by hearsay, as Sheridan takes great pains to show. He does not seem to observe that by proving that the affidavits afforded but little evidence against the Begums, he also proved that Impey had done nothing to injure them. The plain truth is that the contents of the affidavits strongly corroborate Impey's account of the reason why they were sworn. Their main subject is the affair of Cheyte Sing and the operations against him. The Begums are referred to slightly and incidentally.

(3) The remarks that Impey did not read the affidavits, asked no questions about them, and acted out of the local limits of his jurisdiction, are not quite correct, for it appears from his evidence that Impey did ask the nineteen deponents to the Persian affidavits whether the contents of their affidavits were true. But however this may be, these remarks show ignorance of the law.

<sup>1</sup> Namely, in bundle iii., which contains the nineteen Persian affidavits, L, M, N, O, P, and Q. In bundle ix., which contains the affidavits of English officers, B by Colonel Hannay, C by Major Macdonald, and D by Captain Williams. There is also a second affidavit by Colonel Hannay numbered xi.

(4) The remark that Impey could not read some of the affidavits "because they were in the dialects of northern India and no interpreter was employed" is incorrect. All the affidavits were in English except nineteen in Persian, one Persian translation of a Hindustani original, and one in French. Not one was in any "dialect of upper India." This assertion is remarkable, because it is an error upon an error. In his original review Macaulay said, "the greater part (of the affidavits) indeed he could not read, for they were in Persian and Hindustani." On learning from Mr. Macfarlane's work that Impey knew Persian, the passage was altered to the incorrect form in which I have quoted it, a false premiss being substituted for one which was half true, in order to suggest a conclusion wholly false—namely, that Impey was unable to read the affidavits.

(5) The concluding part of the extract about Impey's motives shows ignorance of the simple explanation given of his own conduct by Impey, that his object was to authenticate Hastings's narrative as far as he properly could. This narrative is not mentioned by Macaulay, who probably had never heard of it, and who, by not knowing of it, is driven to the absurd conclusion that Impey "intruded himself" into the matter because the peculiar rankness of the infamy thus to be got at Lucknow must be supposed to be inexpressibly alluring to him.

I here take leave of Lord Macaulay's essay of which I have spoken so much and so severely. I will add a few words in a different tone. My censures are in themselves a tribute to Macaulay's genius, for if I had not felt him to be an extraordinary man I should not have cared to criticise him so minutely or to con-

tradict him so emphatically. I feel too like a surveyor criticising a painting by the help of a compass and a footrule. Accuracy in matters of fact is, no doubt, indispensable to justice. Its importance is continually being impressed upon every one connected with the administration of justice, and especially upon every judge, but it is by no means everything. Imagination "the noble faculty" to quote Macaulay's essay once more, "whereby man is able to live in the past and in "the future, in the distant and the unreal" is in itself a far higher quality than even industry or accuracy; and the same may be said of that manly form of eloquence which by the suppression of unnecessary detail, and the use of apt short expressive phrases, puts vigorous thoughts into a striking form. I do not think any one can have a stronger admiration than myself for <sup>1</sup> Macaulay's *Essays*. Their manly sense, their freedom from every sort of mysticism, their courage and directness, their sympathy with all that is good and honourable, untainted by the very faintest touch of sentimentality, made them in my boyhood my favourite book. I knew them almost by heart at one time, and the essays on Hastings and Clive were the writings which upwards of forty years ago gave me a feeling about India not unlike that which Marryat's novels are said to have given to many lads about the sea. In later life the <sup>2</sup> Penal Code which I had special occasion to study, appeared to me to be a work of true genius, and one which showed that its author might have been the

<sup>1</sup> I wrote a short but heartfelt notice of him and his works in the *Saturday Review* on the occasion of his burial in Westminster Abbey. It was afterwards reprinted in a forgotten (or rather unknown) volume called, *Essays by a Barrister*, published in 1859.

<sup>2</sup> See my *History of the Criminal Law*, iii. 298—324.

greatest of English lawyers if he had not preferred greatness of a different kind. Of his personal qualities as I knew them I will only say that I think his nephew has in no degree flattered him.

Of the attacks upon Impey which I have done my best to refute it is fair to say, that they occur in a review of which its author, when he wrote it, probably did not know the importance. To him it was a mere effort of journalism, hastily put together from most insufficient materials. To the memory of Impey it was a gibbet. To the whole English nation it has become the one popular account of the early stages of the Indian Empire—the accepted myth. Slightly to adapt the famous remark of De Quincey in his essay on *Murder as a Fine Art*, Impey has owed his moral ruin to a literary murder of which Macaulay probably thought but little when he committed it.

## CHAPTER XVII.

### BARWELL'S LETTERS.

I HAVE the permission of several members of the family of Richard Barwell, the colleague and supporter of Hastings, to publish such of his letters as throw a light upon the subjects of this book. I have availed myself of their kind permission to a certain extent. The letters are of course those of an eager partisan, and I have not attempted to verify their assertions. They seem to me, however, too curious and life-like to be lost. They were written to his sister, who appears to have been his principal English correspondent.

The most curious of them is the following account of Nuncomar, which is not dated. It obviously represents reports current at the time, and probably contains a fair share of truth mixed up with exaggeration and perhaps even falsehood. I give it on account of its curiosity, and for what it is worth.

#### ACCOUNT OF MAHA RAJAH NUNCOMAR.

"It is wholly impossible for a man to commit to writing a full account of all the plots and machinations of the Maha Rajah Nuncomar, because a complete

“knowledge of every individual transaction is not to be  
“obtained, except from those by whose agency they were  
“performed, but some of his principal actions which are  
“most notorious may be brought to light. Yet even of  
“these, if it be desired to quote exactly every year and  
“every month of each year in which they occurred, ex-  
“clusive of the length of time which would be necessary  
“for so minute an investigation, it would cost an able  
“writer at least a month to arrange and finish the  
“work.

“The present attempt is only meant as a summary  
“account of the principal transactions of the Maharajah ;  
“some of which may be ascertained by inquiries from  
“those who have been long conversant with the affairs of  
“this kingdom, and others may be proved by a reference  
“to the Records of the Council. But at the same time  
“these general hints may incline some of the people in  
“power to investigate the particulars.

“Nuncomar Roy is son to Padlab Roy, who always  
“held some office under government, and was Aumil of  
“two or three Purgunnahs, such as Futtah Sing, Ghourih  
“Gaut and Sutseetra, the Jummah of which might be  
“about Rs. 150,000 at the period, and he appointed  
“his son Nuncomar Roy, as a kind of Naib under  
“him.

“Some time after this, some time in the reign of the  
“Nabob Ally Verdy Khan, more generally called Mehabut  
“Jung, Nuncomar was appointed Aumil of the Pur-  
“gunnahs of Higly and Musadul, where after a little  
“while he was guilty of much malversation in his office  
“and incurred a balance of Rs. 80,000, having besides  
“used excessive oppressions upon the Zemindars and  
“Ryots.



“ They laid their complaints before the <sup>1</sup> Roy Royan Cheyn Roy, who was extremely kind and merciful to the subjects and who bore the best character of any one Roy Royan Cheyn Roy immediately displaced Nuncomar, and after his accounts were properly stated, confined him in chains for the payment of his balance, and summoned him daily to the Khalsa Cutcherry where he was constantly flogged and beaten. A considerable time passed away in this manner, and at last Padlub Roy, out of his paternal affection, paid from his own cash the balance due to government and released his son; but upon being made acquainted with his infamous practices, swore never to see Nuncomar's face and never forgave him in his lifetime.

“ Cheyn Roy, also the Roy Royan, gave orders that so notorious a villain should never be suffered to enter the Cutcherry. When Nuncomar found himself absolutely prohibited from the Khalsa Cutcherry, he procured an introduction to Nabob Hossien Khan Naib to the Nabob Mehemut Jung deceased; upon intelligence of this Cheyn Roy the Roy Royan sent a full account of all the frauds and infamous practices of Nuncomar to the Naib who immediately drove him from his house and during these transactions a considerable space of time elapsed. As soon as the seeds of internal enmity sprang up between the Nabob Mehabut Jung and his General Mustapha Khan, and Nuncomar began to suspect it (as it is his nature to apply himself diligently

<sup>1</sup> *Râi-râyan*, corruptly *roy-royan*—literally prince of princes, but applied as a title to Hindu civil functionaries of high rank. It was the title borne by the financial minister and treasurer of the Nawab of Bengal, and was assigned by the British Government to the chief native revenue officer whom they appointed in 1772 on abolishing the office of Naib Diwan (Wilson).

“to a party, when any disturbance arises between great men) he immediately waited upon Mustapha Khan. God only knows what passed between them at that conference, all that came to public knowledge is this, that Mustapha Khan took into his hands the <sup>1</sup> Mal-guzarry of several Zemindars, for some of whose lands Nuncomar became security. At last when a heavy balance was incurred upon those lands, and Nuncomar’s practices came to be better understood, Mustapha Khan determined to seize and send him prisoner to the Roy Royan. He by some means got intelligence of this, and escaped so secretly to Calcutta, that nobody could discover whither he had fled. But when the quarrel between the Nabob Mehabut Jung and Mustapha Khan openly broke out, and Mustapha was slain, and the Roy Royan Cheyn Roy also was dead, Nuncomar again made his appearance at Moorshedabad, and by the recommendation of the <sup>2</sup> Mutsudees obtained the collection of the Purgunnah of Sutseetra.

“About that time he borrowed Rs. 2000 from Meer Hoobutulla, an inhabitant of Hooghly. He was soon recalled from his post, and after having settled his account at Moorshedabad, he went to Hooghly in search of a subsistence while Mahomed Bey Khan was <sup>3</sup> Fougdar there. While he was there Meer Hoobutulla set <sup>4</sup> Peiadais Mohsill upon him for his debt of

<sup>1</sup> Revenue assessment.

<sup>2</sup> *Mutasaddi*, corruptly *mootsaddy*, &c., a writer, a clerk (Wilson).

<sup>3</sup> *Fauj*, an army, a multitude, police jurisdiction. *Faujdar*, an officer of the Mogul Government who was invested with the charge of the police and jurisdiction in all criminal matters. A criminal judge. A magistrate. The chief of a body of troops (Wilson).

<sup>4</sup> *Piada Peada*, an armed servant, the same as peon. *Mohásala*, *Mohásali*, restraint set upon a person to prevent his escape, or to

“Rs. 2000 and confined him closely for five days, <sup>1</sup> during  
“all that time he neither drank nor eat, nor performed any  
“of the natural evacuations. At last by the assistance  
“of Sheik Rustum, the father of Comal ud deen Khan,  
“he procured a certain person, inhabitant of Purtabpoor,  
“to be his bail for a limited time of fifteen days, and  
“obtained his liberty, and having taken up at Chander-  
“nagore shawls to the value of Rs. 2000, he sold them  
“for Rs. 1200 ; 1000 of which he gave the man who was  
“his bail, and keeping 200 to himself absconded from  
“Hooghly for the remainder of the debt which was  
“Rs. 1000, and went to Moorshedabad. After some  
“time Mahomed Yar Beg Khan was displaced from the  
“Foujdarry of Hooghly, and Hidayet Ali Khan put in  
“his place. At that time Nuncomar had liberty of  
“paying his respects to the Nabob Suraji-ud-dowla, but  
“was so poor that he would purchase upon credit horses  
“or shawls or any such things from the shopkeepers at  
“the price of Rs. 2000 perhaps, and then sell them for  
“ready money at Rs. 1000, Rs. 500 of which he would  
“pay to the shopkeepers, and support himself upon the  
“remainder, while the shopkeepers were constantly  
“importuning him for the balance of their debts. It  
“happened that the Nabob Suraji-ud-doula was sitting  
“in a retired part of his palace one day, when Nuncomar  
“went to pay his respects, and upon his whispering some-  
“what to the Nabob (but what he said nobody knows)  
“the Nabob became exceedingly angry, and ordered him  
“to be most severely bastinadoed with a bamboo. As  
“Nuncomar is of an excessively strong constitution, he

inforce payment of a demand. (Wilson) The word is often written  
“mohussil.”

<sup>1</sup> Compare his behaviour in prison in Calcutta.

“escaped with life from that beating, which it is certain  
“would have killed any other person. Besides which  
“Nuncomar by order of the Nabob was sent to Hidayet  
“Ali Khan at Hooghly. Hidayet Ali Khan had heard  
“that Nuncomar had been applying for the Dewanny at  
“Hooghly, wherefore he used every kind of severity  
“against him and every method to disgrace him.  
“Nuncomar some time after with much difficulty made  
“his escape from Hooghly and went again to Moor-  
“shedabad, where he was reduced to the utmost poverty ;  
“and at last Mahomed Yar beg Khan was again  
“appointed Foujdar of Hooghly.

“At that time Nuncomar waited upon Munshey Saduk  
“ulla, who was the intimate friend of Yar Beg, and paid  
“him constant attendance twice a day, till such time as  
“Saduk ulla took upon himself the patronage of Nuncomar  
“and introduced him again to Mahomed Yar Beg. After  
“a stay of five months Mahomed Yar Beg left Hooghly  
“and took with him Nuncomar, with intent to procure,  
“if possible, Lahowry Mull, in whom he had great con-  
“fidence, to be made his Dewan, and not Nuncomar,  
“whom he knew to be very poor, and whom he brought  
“to Hooghly ; but upon Lahowry Mull being made Dewan  
“at Hooghly Nuncomar was reduced to the last distress  
“and went again to Moorshedabad.

“After some time, Lahowry Mull, by a piece of in-  
“gratitude, procured the Hooghly customs to be separated  
“from the Foujdar, who therefore cast about to choose  
“another Dewan, and as Munshey Saduk ulla was a most  
“firm patron to Nuncomar, he strongly recommended  
“him and procured the appointment for him.

“Nuncomar remained three years at Hooghly, showing  
“the utmost respect to Saduk ulla, and from that period

“ constantly bore the appellation of Dewan. Luckily for  
“ him, Mahomed Yar Beg Khan was a man of wonderful  
“ patience and good nature, else he would have dismissed  
“ Nuncomar, as he was very desirous of doing from his  
“ known and notorious bad practices.

“ At the end of three years, Mahomed Yar Beg was  
“ dismissed from his post and went to Moorshedabad,  
“ taking with him his Dewan Nuncomar. After his  
“ arrival there one year was spent in examining him con-  
“ cerning the balance of his account, during which period  
“ the Nabob Mehabut Jung died and Suraji-ud-dowla  
“ became absolute Nizam, who after a little time quarrelled  
“ with the English gentlemen, and took and plundered  
“ Calcutta, and at first appointed Mirza Mahomed Ally  
“ to be Fougdar of Hooghly and afterwards Sheik Umer  
“ Ulla. At that time Dewan Nuncomar, having scraped  
“ together a little money from his former post, left his  
“ former master’s accounts unsettled, and by bribery  
“ procured himself to be made Dewan to Sheik Umer  
“ Ulla, and after some space of time found means to  
“ procure the dismissal of Umer Ulla and to get himself  
“ appointed Fojudar in his room.

“ About that time, when Colonel Clive Sabut Jung  
“ was besieging Chandernagore, Dewan Nuncomar Roy  
“ sent him complimentary messages by one Kissen Ram  
“ Bow, and upon his first coming the Colonel conceived a  
“ prodigious friendship for the Dewan and upon this intro-  
“ duction, after the Colonel had taken Chandernagore, de-  
“ feated the Nabob Suraji-ud-dowla, and placed Meer  
“ Mahomed Jaffier Khan upon the <sup>1</sup> Musnud. Dewan Nun-  
“ comar Roy was permitted constantly to visit the Colonel  
“ from Hooghly, and was also sometimes consulted by him

<sup>1</sup> Throne.

“ on particular affairs, to show an evident partiality for him.  
“ It now happened that Colonel Clive was to go to Patna,  
“ and Maha Raja Dooliah Ram appointed Dewan Nuncomar  
“ Roy as his vakeel to accompany the Colonel and fur-  
“ nished him with tents and baggage of all kinds, and  
“ with all expenses from his own cash to the intent that  
“ Nuncomar being constantly attendant upon the colonel,  
“ might use his utmost to cement and to increase the  
“ friendship that was between the Maharajah and the  
“ colonel, and afterwards upon the arrival of Dooliah Ram  
“ himself at Patna, Nuncomar had so ingratiated himself  
“ into favour that it was usual for the people to style him  
“ the black colonel.

“ By this means Nuncomar had now obtained a com-  
“ fortable livelihood, and was much confided in from his  
“ Dewanny at Hooghly. Afterwards when they arrived  
“ at Moorshedabad by the strong recommendations of  
“ Colonel Clive, Nuncomar was appointed Dewan to  
“ Mahomed Ameer beg Khan, who was instituted Foujdar  
“ of Hooghley Hidgeley, &c., and when the company ob-  
“ tained the <sup>1</sup> Tunkaw of Burdwan and Kishnagur for the  
“ money due to them, the collections of these two  
“ provinces were given to the Dewan Nuncomar, by the  
“ recommendations of Colonel Clive.

“ Nuncomar now contrived to bring about an enmity  
“ between Maha Raja Dooliah Ram, and the Nabob Meer  
“ Mahomed Jaffier Khan, which almost came to open  
“ war, at which time the Dewan Nuncomar, having raised  
“ some auxiliaries, brought the Maha Rajah Dooliah Ram  
“ from Moorshedabad to Cossimbuzar, from whence he

<sup>1</sup> *Tankwall* (introduction), an assignment by the ruling authority upon the revenue of any particular locality in payment of . . . any specified head of change (Wilson).

“conducted him with all his dependants, baggage, and  
“effects to Calcutta; after which Dewan Nuncomar  
“returned to Hooghly, and to the care of his own  
“affairs, and at that period, at the height of his  
“authority, he demanded from Mahomed Yar Beg  
“Caun, who had been his great friend and patron,  
“14,000 rupees under pretence of expenses formerly  
“incurred, and by threatening him with an examina-  
“tion of all his accounts.

“Mahomed Yar Beg, looking upon Nuncomar’s  
“principles to be like those of the adder which will  
“inevitably sting the bosom that cherishes it, paid his  
“unjust demand. Afterwards Nuncomar gave such per-  
“nicious advice to Ameer Beg Khan, that he raised a  
“suspicion of him in the mind of the Nabob Meer  
“Mahomed Jaffier Khan, so that Ameer, finding his  
“situation desperate, begged leave to resign his post, and  
“got on board a vessel.

“Nuncomar also, being much terrified for the con-  
“sequences of the commotions he had caused, and of the  
“practices he had committed, withdrew from his post and  
“set himself down in Calcutta.

“Rajah Ram Sing, chief <sup>1</sup> Harcarrah, also came and  
“took up his abode in the same place, where Maha  
“Rajah Dooliah Ram had long before fixed his residence.  
“These three persons entered into a close combination  
“and sent vakeels with great expedition to Delhi to  
“solicit employments, viz., the post of Dewan of  
“Bengal for Maha Rajah Dooliah Ram, and the Naib  
“Dewanny for Nuncomar, and for Rajah Ram Sing his  
“original appointment. After some time it was dis-

<sup>1</sup> *Har-kara*. *Har*, every; *kara*, from *karna*, to do. A messenger, a courier, an emissary, a spy (Wilson).

“covered that Dewan Nuncomar was soliciting the post of <sup>1</sup>Canoongoe for his own son, upon which Maha Rajah Dooliah Ram was much offended with him, and no longer imparted his secret designs to him; after which Dewan Nuncomar and Rajah Ram Sing sent letters from themselves into Hindostan with one accord. At length, when Mr. Vansittart Shems ud deen arrived in India, and Meer Mahomed Cossim Khan was made Nizam, and the Nabob Meer Mahomed Jaffier Khan came to reside at Calcutta, Dewan Nuncomar connected himself very closely with Meer Jaffier Khan, and they entered into an obligation with each other. But the Nabob Jaffier Khan made his obligation with this condition. That he would not hold a correspondence with any person by letter or otherwise himself, but that Nuncomar should act as he thought it best, and that hereafter, if at any time Meer Jaffier should recover the Nizamut, he would patronise Nuncomar with all his power.

“At that time Dewan Nuncomar had at first much insinuated himself into the favour of Mr. Vansittart. But afterwards, upon Colonel Clive's departure for England when he had learnt a full account of all Nuncomar's malpractices, and had written particularly to Mr. Vansittart upon this subject, Mr. Vansittart still kept up the appearance of friendship and countenance to Nuncomar openly, but at the same time intrusted him with no part of his confidence. Upon which Dewan Nuncomar studied every possible method to raise a war and to endanger the Company, to which purpose a letter

<sup>1</sup> *Kánángo*, literally an expounder of the laws, but applied to village and district revenue officers. The office was abolished in Bengal at the permanent settlement (Wilson).



“ of his was detected after the victory of Burdwan and the death of Indar Jat Perkhee.

“ Whereupon Mr. Vansittart put a guard of Sepoys upon him, and produced before the Council many treasonable letters and copies taken from Nuncomar's house, all which letters and papers Mr. Hastings interpreted, and the whole affair is to be found upon the records of the Council. But as by the contrivances of Nuncomar a dissension was caused among the gentlemen of the Council, he was released from his guard at the end of forty days.

“ After his release he wrote and sent two letters stamped with the seal of Nabob Meer Mahomed Jaffair Khan, one to Colonel Clive, and one to the Company, containing a number of false relations, and invectives against the English gentlemen and others.

“ This also was discovered to Mr. Vansittart, who thereupon forbid Nuncomar to stir out of his own house, or to receive visits from any person, and three or four months passed in this manner, till the arrival of Colonel Coote, at which time by the advice of Mr. Amyat and Mr. Ellis, Nuncomar waited upon the colonel, whom he persuaded implicitly to pursue the measures pointed out by his false accusations; and when the colonel was designing for Patna, they gave him several instructions, and it was settled among them that Dewan Nuncomar also should go with him.

“ But then Mr. Vansittart, considering what a detriment must come to the affairs of the Company from such a step, first intreated that Nuncomar might be left behind. But when he found the Colonel resolute and importunate, it was at last settled that the Colonel should first set off, and that the Dewan Nuncomar should obtain leave from Mr. Vansittart in three or

“four days afterwards and follow him, that the world might not observe that the Dewan went to Patna in open and direct opposition to the Governor’s will.

“At last, when gentlemen of the Council had set off for Patna, a dispute arose in Calcutta concerning some letters which, on the outside of the cover, bore the seal of Ram Churn Roy, but in the inside were written by a different hand, containing certain addresses to Camgou Khan and others which had been fabricated by Dewan Nuncomar, and a letter also was discovered addressed to <sup>1</sup>Monsieur Lowes with a proposal for exterminating the Company.

“Upon these disputes Munshi Sudder ud Deen and others were grievously harassed, and Nuncomar was again imprisoned under a Sepoy guard. All these circumstances are stated in the most clear and authentic manner in the Records of the Council.

“But even at that period under confinement Nuncomar did not in the least abate of his haughtiness, but a minute account of this would be too prolix.

“Afterwards Colonel Coote and the Nabob Meer Mahomed Cossim Khan came to an open rupture, and Mr. Amyatt, Mr. Ellis, and other gentlemen were cut off, and then it became necessary for the gentlemen of Council to replace Meer Mahomed Jaffier Khan upon the Musnud, at which time, upon the applications of Meer Jaffier, Mr. Batson and other gentlemen released Nuncomar from the Sepoy guard where he had been confined near a year, and farther to patronise him, held a council at the house of Meer Jaffier, though at that time nobody had had any confidence that the Dewan Nuncomar could ever get over his crime.

<sup>1</sup> No doubt M. Law, chief of the French factory at Cossimbuzar.

“ But at last he was released in this manner by their  
“ favour, and attended Meer Mahomed Jaffair Khan in  
“ the war against Meer Cossim Khan with the title  
“ of Dewan to the Roy, Khalsah. When the victory  
“ was decisively obtained over Meer Cossim, the Dewan  
“ Nuncomar, unknown to the Nabob Mahomed Jaffair  
“ Khan, solicited and obtained from the <sup>1</sup> king the title of  
“ Maha Rajah, while he was with the army, which was  
“ afterwards however confirmed to him by the Nabob  
“ Meer Jaffair Khan.

After this when Meer Mahomed Cossim Khan fled,  
“ and the Nabob Shujah ud dowla had levied an army,  
“ Maha Rajah Nuncomar wrote a letter to Bulwantsing,  
“ upon discovery of which treasonable correspondence  
“ General Carnac was determined to seize Nuncomar, and  
“ send him under a guard to Calcutta. But at last by the  
“ earnest endeavour of Maha Rajah Nobkishen, who at that  
“ time was Banian to Major Adams, he escaped. A full ac-  
“ count of this is to be found in the Records of the Council,  
“ where every particular of the whole affair may be learnt.

“ After this the Nabob Meer Mahomed Jaffair  
“ Khan came with the Maha Rajah to Calcutta, who by  
“ his pride and insolence having disgusted all the gentle-  
“ men, who had been the firmest patrons of his life and  
“ fortunes, such as Mr. Johnson, Mr. Batson and others,  
“ returned to Moorshedabad, where, upon his arrival he  
“ suffered the Zemindars to escape with most enormous  
“ deficiencies in their revenue, and by this means amassed  
“ a fortune of many lacks of rupees and brought all the  
“ principal men in the state to the utmost distress. All  
“ this may be easily authenticated by investigating what  
“ quantity of money was collected in revenue for those

<sup>1</sup> *i.e.* Shah Alam, Emperor of Delhi.

“two years, and what kind of impositions were put upon  
“all the first men of state.

“After this, when upon the Nabob Meer Mahomed  
“Jaffier Khan's death, the Nabob Najim ud dowlah  
“succeeded to the Musnud, during the government of  
“Mr. Spencer, when Mr. Johnson and Mr. Leycester  
“were sent to Moorshedabad, where Mr. Senior and Mr.  
“Middleton then were, and the Nabob Muzuffer Jung  
“who had been summoned to Calcutta was also sent up  
“to Moorshedabad; after a tedious and violent dispute  
“Muzuffer Jung was appointed Naib, and the Maha  
“Rajah was sent under a guard to Calcutta, as the  
“Records of Council will more fully set forth.

“Some months after this Lord Clive, Mr. Sumner and  
“Mr. Sykes arrived in Calcutta from Europe, whither  
“also came the Nabob Najim ud dowlah and all his  
“officers. At that time Maha Rajah Nuncomar himself  
“forged a great many papers and wills, and fictitious  
“letters from the Nabob Nijeeb Khan to Muzuffer Jung,  
“and brought false accounts of Muzuffer Jung's mal-  
“administrations at Dacca to Lord Clive. But as that  
“lord had formerly known the extraordinary fallacies  
“and frauds of the Maha Rajah, and had discovered  
“his waste and appropriation of lacs of rupees, not-  
“withstanding all the efforts of Mr. Gregory in his  
“behalf, he never would have the least opinion of him,  
“but flatly and plainly declared that he was fully ac-  
“quainted with all Nuncomar's iniquities, and that he  
“knew his whole designs were to have been to stir up  
“disturbances in the kingdom, and that when he, Lord  
“Clive, was formerly in India, Nuncomar had always  
“given him the most pernicious advice. In short Lord  
“Clive appointed Muzuffer Jung the principal minister,

“and appointed Maha Rajah Dooliah Ram and Juggut  
“Seat to assist him in the government, and had de-  
“termined in his own mind, for the tranquillity of the  
“kingdom, to banish Nuncomar into Chittigong, and all  
“Nuncomar’s family were then in the utmost tribulation  
“upon that account.

“This circumstance is also to be met with in the  
“records of the council during Lord Clive’s government.  
“But <sup>1</sup> Maha Rajah Nobkishen represented that as Maha  
“Rajah Nuncomar was a Brahmin, it was not right to  
“punish him too severely, therefore his sentence of  
“banishment to Chittigong was left unexecuted.

“When Lord Clive departed for Europe, and Mr.  
“Verelst succeeded to the chair and Nuncomar found he  
“should not be banished to Chittigong, he set about all  
“methods to prejudice Nobkishen, and suborned a woman,  
“by name Neeboo, for a present of 2,000 rupees to  
“accuse Maharajah Nobkishen of having forcibly com-  
“mitted a rape upon her. This affair, after a long  
“and minute investigation proved to be all a contrivance  
“and a false accusation, and Ram Surrin Gore, who had  
“been suborned by Maharajah Nuncomar to tutor the  
“girl, was drummed out of the town and banished. Be-  
“sides this upon the same affair, <sup>2</sup> fourteen blank covers  
“of letters sealed with many English gentlemen’s and  
“Hindostanee names were found in the Maha Rajah  
“Nuncomar’s house, and delivered into Council, as  
“may be fully proved by reference to the Records of  
“Council. Besides which, if the Records of Council,

<sup>1</sup> Compare his reluctance to give evidence on Nuncomar’s trial, vol. i. pp. 119, 120.

<sup>2</sup> This is probably the same story as the one quoted by Macaulay from the *Siyyar ul Mutaqherin* about seals found in Nuncomar’s possession after his execution.

“under each particular Governor were searched, many  
“other notorious offences of Maha Rajah Nuncomar  
“would come to light.

“After this in the Government of Mr. Hastings the  
“Maha Rajah betook himself to his old practices, and was  
“guilty of the most palpable and notorious fallacies and  
“frauds in the affair of the Nabob Muzuffer Jung, as the  
“proceedings of Council will fully set forth; and after  
“the favours conferred upon him by the Governor, the  
“notorious ingratitude with which he has now treated  
“him is as clear as the sun. The inference in this that  
“whoever has at any time conferred any obligation upon  
“the Maha Rajah Nuncomar, he has never failed to return  
“a proportionable degree of malice and evil. These few  
“outlines of his character are drawn to give some small  
“idea of him, though not one villainy in a hundred, nor  
“1,000th part of his crimes are herein displayed. But by  
“the blessing of God the full and complete account of the  
“Maha Rajah and of all his transactions shall hereafter  
“be particularly and minutely recorded in a larger work.”

The following extract from a letter to Mr. John Graham,  
dated 9th August 1775, should be read here :—

“Poor old Nuncomar is at last fallen by his own  
“villainies. He was brought to trial on the charge of a  
“forgery to defraud the estate of Bollaky doss. After an  
“examination of many days in the course of which every  
“evidence he produced was detected of perjury, the jury  
“brought him in guilty, and on the 5th of the present  
“month, at half past nine in the morning, he suffered by  
“the hands of the hangman. He conducted himself with  
“decency, and at the place of execution acknowledged  
“the justness of the sentence by which he suffered.

“The various arts that have been used to support and  
“screen this man would take up a volume in the detail,  
“and will reflect not a little on the General and Colonel  
“Monson, who both particularly busied themselves in his  
“cause, disputed with the judges on his account, and  
“advanced a plea of right in the Government to step forth  
“on all occasions for the protection of the natives when  
“oppressed by the proceedings of the Judicature.

“Various are the minutes and letters on the subject,  
“but such pretensions and such an improper interference  
“to take Nuncomar out of the hands of justice struck the  
“Governor and myself so forcibly, that we refused to  
“set our names to any letters broaching these wild  
“doctrines.”

#### BARWELL AND CLAVERING.

The following extract from a letter to his sister, dated May 15th, 1775, is not only characteristic but entertaining:—

“I shall continue my support of Mr. Hastings, un-  
“discouraged by the disagreeableness of my situation,  
“and unshaken by the advances of General Clavering, &c.  
“The whole scene I have had with the General is in all  
“its parts well adapted for the Volpone of Ben Jonson.  
“Whatever could have operated on a man’s wishes or his  
“fears has alternately been held out to me. His daughter  
“at one time plays with my affections, if not with her  
“own. I deal plainly with her, expose my situation, and  
“intimate my expectations from her. Matters are brought  
“to a point. The father then interferes—begins sud-  
“denly to doubt my public conduct, and withdraws his  
“daughter. But it is without effect, and, having proved  
“me not to be a dupe of passion, he begins to bluster.

“ He threatens me with the terrors of the law—he brings forward a false charge touching the benefits I derived from salt while at Dacca. I do not deny the profits I made. I avow them. I always avowed them. They were neither secret nor clandestine, but I object to the conclusions drawn, and refute them. Finding me superior to this, he descends to scurrility, calls names, or uses language to the same import. I return the supposed insult. He does not avow the words or any intent to insult. It is gone too far. I cannot retract without a wrong idea possibly being impressed of my motive. I meet him in this opinion. I am providentially preserved. I then enter into an explanation, because my motive cannot be misconstrued. I declare I applied the affront I gave to such particular language; that I meant to give the affront to whoever presumed to hold such language to me—that I must have been mistaken, as the General did not avow the words at which I took offence, and as he declared he did not intend me an affront, I could not do less than apologise for that I had given under the persuasion that I had received one from the General. Here we ended, and from that hour to this we have been extremely polite to each other, at times familiar on his part and encouraging to resume my visits to his house; but hitherto I have declined the least advance to this connection I once thought of, and have no idea of taking it up again. The young lady I sometimes meet in public assemblies, and though I confess a pleasure in perceiving the same conduct and the same attention on her part that I ever received, yet there is something more due in my opinion. My views have been opened to her and referred by her to her father. In my circumstances, therefore, they can never be revived, unless



“ he comes forward. This his pride, I imagine, effectually  
“ prevents, especially as he would wish first to be ascer-  
“ tained how I am disposed, which I shall never give him  
“ an opportunity of knowing, as I am perfectly indifferent  
“ to a change of condition, whatever attachment I might  
“ have had, and still may have, for his daughter. ‘Keep  
“ ‘your own state, no other lot prefer,’ is the sentiment  
“ of a philosopher who perfectly understood human  
“ nature, and I am convinced comprises in it the limited  
“ happiness of man.”

#### BARWELL'S CHARGES AGAINST THE COUNCIL.

The following letter from Barwell to his sister, dated Calcutta, August 5th, 1775, the day of Nuncomar's execution, gives his view of the means used by the Council to collect evidence against Hastings. It is worth reading, as showing the temper of the time. Some expressions in it look as if Barwell did not believe in the purity of Hastings, and of course the truth of his statements cannot now be tested in detail. They seem, however, to be worth preserving, especially as they show what was said against the Council on the subject of suborning evidence—a matter to be borne in mind in considering their representations that Hastings suppressed it. Whatever the letter may prove, here it is—

TO MRS. MARY BARWELL.

“CALCUTTA,  
August 5th, 1775.

“The state of our Council remains the same as  
“described in my former letters, and if any alteration  
“is to be brought about by the influence of money, in

“that case no risk of private loss should be regarded. Nor must you regard the expense of some thousands to secure ultimately any great object to your brother. How far it may be practicable to give success to Mr. Hastings I know not. I flatter myself, however, that his interest will bear him through, and baffle the insidious practices of General Clavering and his Junto to remove him from the Government. The means they have taken are certainly base and infamous; they oppress all who are any way connected with him, and the most vile among the natives who will only lay a charge or complaint against him they reward with whatever they claim for a compensation, whether it be lands, high offices, or honours. They threaten every man in station under the Government with their displeasure, and supposing that they have it in their power to accuse the Governor of some venial trespass or peculations, they are so barefaced as to propose the accusing of him by them as the only condition for continuing them in their employments.

“Amongst the multiplicity of instances of this nature, I will enumerate a few :

“1. The Rannee of Burdwan, a vile prostitute and a dishonour to one of the first families in Bengal, who unsuccessfully attempted to bribe the Governor and some members of the late Council with a donation of four lacs of rupees to possess that degree of independence and power which the new Government has thought proper to confer on her—her only merit consists in attempting to vilify the Governor and Mr. Graham, and the only demerit of Brijookissen Roy, the guardian to the young Rajah and Dewan to the household, is declining the infamy of an informer

“ from disinclination, or the want of ability to assume  
“ that character, who has been in consequence removed.

“ 2. The removal of Khan Jehan Khan, Phousdar of  
“ Hooghly, who either would not or could not authen-  
“ ticate the improbable relation given by Zeen-ul-ub-  
“ deen-Khan to the Board, of his holding the station of  
“ Phousdar upon condition of paying to the Governor  
“ the major part of the salary annexed to his office.  
“ The pretext for this man’s removal was contempt,  
“ though unsupported by any proof of the contempt  
“ alleged.

“ 3. The honours and distinctions paid to Raja  
“ Nuncomar upon the merit of his accusing the Governor,  
“ and as Zeen-ul-ub-deen-Khan before named was his  
“ instrument in the former accusation, at his recom-  
“ mendation Mirza Mindee was appointed Phousdar of  
“ Hooghly, with a stipend of 3000 rupees per mensem.  
“ Mirza Mindee previous to this was a dependant of  
“ Rajah Nuncomar, and content with the humble salary  
“ of (20) twenty rupees per month, which the Rajah  
“ allowed him for his sustenance. This was, in fact,  
“ making Nuncomar Phousdar of Hooghly, while it was  
“ ostensibly in the name of Mirza Mindee.

“ 4. The deposition of the Nabob Jaffier Ali Khan’s  
“ Begum from the guardianship of the young Nabob,  
“ and superior of the household, because she would not  
“ or could not verify the accusation of Nuncomar touching  
“ certain sums of money said to have been paid to the  
“ Governor and others by her order.

“ 5. The advancement of Rajah Goordass, the son of  
“ Nuncomar, to the offices held by Jaffier Ali Khan’s  
“ Begum, and the giving him the charge of her person,  
“ with the removal of the son-in-law of Rajah Nuncomar

"(Juggutcheend) because he declined to forward or abet  
"the measures of his father-in-law, and in consequence  
"was upon ill terms with him. Juggutcheend was  
"Paishcar or superintendant of the Nabob's household  
"under the Begum.

"6. The oppression of Commaul O Dien Khan for  
"adventuring to lay before the public the conduct of  
"Mr. Fowke and Nuncomar, by whom he had been  
"involved, and grossly imposed upon. This man is a  
"salt contractor, and a farmer of the district of Hidglee;<sup>1</sup>  
"the farm of the district of Hidglee he relet upon certain  
"conditions to another, and the man to whom he relet it  
"paid the rents to the Government, and consequently  
"must be understood to have been accepted as the renter.  
"The Calcutta Council called upon this man as such,  
"treated him as such, and used severities to induce him  
"to admit the balances they stated against the district,  
"the rents of which he collected, agreeably to their ideas  
"of what those balances were. Yet after Commaul O  
"Dien became obnoxious to General Clavering and his  
"Junto, and it was well known he had no charge of the  
"collections of Hidglee, and no power or authority to  
"gather in the rents, the real renter is suddenly regarded  
"as his agent only, and from demanding the rents of him,  
"recourse is immediately had to Commaul O Dien, who,  
"being unable, and without the means of answering such  
"a call, is thrown into the Diwani Prison, while the man  
"who collects the rents, and from whom the Government  
"received the rents, and who had been called upon by  
"the Government to settle the balances due, is styled  
"Commaul O Dien Khan's agent, and free from any

<sup>1</sup> There is no hint here of Commaul's being the Benamidar of Cantoo Baboo.

“demand of Government, being, accountable solely to  
“Commaul O Dien, with whom it rested to bring the  
“man to account.

“Can any transaction have a blacker colour, be more  
“oppressive or more vexatious ?

“Commaul O Dien is a man of little or no property.  
“The real renter is a man of substance, and his security  
“is likewise a man of property. Under these circum-  
“stances it must be evident to the meanest capacity, that  
“in order to effect Commaul O Dien Khan’s ruin and  
“gratify a particular resentment, the Company’s claim,  
“whatever that is, on the responsible persons, are yielded  
“up merely to imprison this poor devil. A Supreme Court  
“of Judicature is, however, fortunately established for  
“his relief, and holds out her protection against such  
“terrible abuses of despotic power ; there he will naturally  
“find an asylum and security against the vindictive rage  
“of a faction.

“7. The ejection of Dalleel Roy from the farm of  
“Rajeshy, who had, with a punctuality seldom found  
“among the native renters, paid his revenue to  
“Government, but this man would not or could not  
“accuse the Governor, and Ramkissen, either truly or  
“falsely charging the Governor under the name of Cantoo  
“Baboo, and others under the names of their different  
“Banians, obtained not only the removal of Dalleel Roy,  
“but a compensation of the Zemindary, in prejudice of  
“the Company’s rights to the eventual succession, or in  
“prejudice to the rights of the surviving branches of the  
“Rajeshy Rajah’s family, if any such are existing ; for  
“more particulars on this subject revert to my letter of  
“the 17th last May.

“8. The dismissal of Gungagovind Sing from his

“office, because he would not or could not give a  
“testimony conformable to the wishes of the opposition,  
“and various others of less note that have suffered, as  
“well as have been promoted.

“These instances will, however, suffice to evince to  
“the world that a species of subornation of the most  
“extensive influence is pursued, and that it will be  
“wonderful indeed if in the end such means do not  
“produce accusations, true or false, to blacken the  
“Governor’s character. Be that as it may, the means  
“may possibly defeat the end, and render the public  
“the friend of a man so villainously pursued and so  
“basely persecuted. For, even admitting the Governor  
“to have benefited by presents, this mode of putting  
“people upon the rack to accuse him, and paying others  
“with lands, high offices, and honours for doing so, is a  
“tyranny that must blend falsehood with truth, and  
“make equivocal any testimony thus obtained.”

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